Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CLUB CAR (QUEBEC) IMPORT, INC.,
MARTIN MURPHY, PETITIONERS

v.

CLUB CAR, INC.,

AND

PIERRE CHAMPIGNY, EQUIPMENTS PIERRE CHAMPIGNY, LTD.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The seminal case law on admissibility of expert witness testimony, *Daubert* and its progeny, sets out guidelines for determining admissibility that are flexible, both substantively and procedurally. Notwithstanding that flexibility, however, opinions of this Court clearly require an analysis that is thorough and exacting, and targets the fit between the proffered testimony and the issues in the case.

What the Eleventh Circuit countenanced in this case, on the other hand, is an admissibility determination based on factors which bear no relation to the facts and issues in the case, and which were not even identified before the exclusion of the witness. What the trial court and the Eleventh Circuit both countenanced in this case is a tardy challenge after the close of evidence, with no excuse for missing the motion *in limine* deadline other than the ambush value.

Even if that were permissible under the flexible *Daubert* procedures, the Eleventh Circuit also permitted the exclusion of expert testimony by the trial court without any authority properly before the court on which to base the exclusion, and ruled that legal argument could be offered via *ex parte* communications so long as there was no presentation of evidence. No other legal authority was ever briefed or argued prior to the exclusion. No opposing expert evidence was offered at any time. More importantly, there was no fit between the factors considered by the court and the evidence excluded. Yet the Eleventh Circuit deemed this confused proceeding an appropriate exercise of the

exacting analysis required under *Daubert*. The questions presented, therefore, are:

1. Does trial court discretion allow admissibility of expert evidence to be determined on the basis of factors that are not relevant either to the testimony or to facts and issues in the case?
2. May the trial court make a determination on admissibility of expert evidence in the total absence of opposing expert testimony or other evidence or authority properly before the court?
3. May factors and analyses supporting exclusion be supplied after the court has already ruled, without first affording the opportunity to present germane argument and evidence?
4. Does the procedural flexibility of Daubert allow a party to withhold its objection and wait in ambush until the close of evidence?
5. May an expert witness with twenty years of experience with the subject matter of his testimony be excluded on the basis that he has never before served as an expert witness?

PARTIES TO THE PROCEEDINGS

Rule 29.1

There is no parent or publicly held company owning 10 percent or more of Club Car Quebec Import Co.'s stock.

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IN THE
SUPREME COURT OF THE UNITED STATES

CLUB CAR QUEBEC IMPORT, INC. and MARTIN MURPHY, *Petitioners*

v.

CLUB CAR, INC., ÉQUIPEMENTS PIERRE CHAMPIGNY, LTD.
And PIERRE CHAMPIGNY,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

Club Car Quebec Import, Inc., the Petitioner, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Opinion and Order of the United States District Court for the Southern District of Georgia denying the motions of Club Car Quebec and Martin Murphy for a new trial and judgment as a matter of law remains unreported and is reproduced at App. 17a. The March 15, 2004 Opinion of the Court of Appeals for the

Eleventh Circuit on the merits is reported at *Club Car, Inc. v. Club Car Quebec Import, Inc.*, 362 F.3d 775 (11th Cir. 2004) and is reproduced at App. 1a. The June 29, 2004 Order of the Court of Appeals for the Eleventh Circuit denying petitioners' timely request for rehearing and declining petitioners' suggestion of rehearing *en banc* remains unreported and is reproduced at App. 149a.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on March 15, 2004. The jurisdiction of the Eleventh Circuit was invoked pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules 10(a&c). The Eleventh Circuit has decided important federal questions in conflict with the relevant decisions of this Court and sanctioned departures from the accepted and usual course of judicial proceedings so egregious as to invoke the supervisory power of this Court.

RELEVANT PROVISIONS

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is

the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

STATEMENT

Rule 702 of the Federal Rules of Evidence permits the admission of expert evidence helpful to the finder of fact. One purpose of such expert testimony is "to determine a fact in issue." Fed. R. Evid. 702. As elucidated under the *Daubert* line of cases, this is a "flexible" inquiry into the "fit" between the evidence proffered and the issues in the case.[1] This requires an "exacting analysis,"[2] in which the flexibility of the approach must not override the goal of determining the fit. Therefore, if the goal is to see that the evidence fits the facts and issues of the case, then the analysis must also focus on the facts and issues of the claims in the case. A determination of admissibility may not, by contrast, be based on factors which are extraneous or irrelevant to the claims for which the evidence is offered.

What is Sought

Though *Daubert* allows flexibility in the factors to be considered, evidence may not be either admitted or excluded where the relevant factors are not considered, or where factors are considered which are not relevant to the claims before the court. Where the

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[1] *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993).

[2] *Quiet Tech DC-8 v. Hurel Dubois*, 326 F.3d 1333, 1341 (11th Cir. 2003).

factors considered bear no relation to the facts and issues in the claims for which the evidence is offered, then that must be rejected as an abuse of discretion, as well as an error under Rule 702. This case should be remanded with instructions to assess damages according to the improperly excluded expert damages evidence.

Facts Material to the Questions Presented

In August of 2000, Club Car, Inc. ("Club Car") terminated and filed suit in state court against its Quebec golf car distributor, Club Car Quebec Import, Inc. ("CCQ") on an open account. The Canadian defendant, CCQ, removed the case to federal court on diversity jurisdiction and counterclaimed against Club Car. Prior to trial, CCQ moved and the court granted its motion to limit its claims in the case, eliminating claims against Club Car implicating future damages as a remedy. App 143-148a. The CCQ counterclaims remaining at trial were breach of contract, conspiracy to breach, promissory estoppel, and breach of fiduciary duty for acts by Club Car between 1997 and 2000, and unpaid commissions between 1993 and 1997. At the time of trial, these claims involved damages other than lost profits, and no *future* damages against Club Car were argued to the jury in the case. App. 144-145a, ¶¶ 1, 3, 6, 7.

Club Car joined in orally raising *Daubert* objections to CCQ's damages expert--on the last day of trial—on grounds which were not in Club Car's pre-trial expert report and of which no prior notice had been given to CCQ. App. 123-133a. The trial court

later justified the exclusion of CCQ's expert on grounds that pertained solely to future damages. App. 53-55a.

CCQ's damages expert, Peter Ryan, is a chartered accountant in Canada with twenty years' experience working with CCQ's business as accountant and financial advisor. App. 93-4, 105a. His report consisted of calculations of damages for each of the various claims in the case.

It is undisputed that Ryan submitted his expert report by the court deadline. It was updated for information later produced by Club Car in discovery, but without any change in the accounting methodology. Ryan was also deposed twice by Club Car on his qualifications, methodology, and conclusions. After these depositions, Club Car submitted its own opposing expert report, which did not question or otherwise address Ryan's methodology or qualifications. Club Car's opposing expert was deposed, and did not challenge Ryan's qualifications or methodology at that time.

Club Car had Ryan's initial report almost a year before trial, had deposed him twice, and had its own expert review all this material. Yet Club Car did not file a *Daubert* motion with respect to Ryan's testimony before the motion *in limine* deadline set by the trial court. Nor was any mention of a potential *Daubert* objection made at the pre-trial conference. App. 88-90a.

On the last day of a five-day trial, as soon as CCQ's damages expert took the stand, Club Car made a motion to exclude Peter Ryan based on his qualifications. App. 88-90a. Though this motion was

made without any prior notice or briefing, the trial court heard and granted the motion to exclude—on the grounds that Peter Ryan had not previously given expert trial testimony. App. 107-109a. Upon strenuous objection by CCQ, the trial court allowed the witness to continue his testimony while reserving its oral ruling denying admissibility. App. 138a.

Club Car did not call its expert to testify at trial. No other witness was called to dispute Ryan's testimony, qualifications, or methodology, and no other evidence was offered by Respondents on these issues.

After Ryan was excused and evidence closed, Club Car joined in another oral *Daubert* objection, on the previously undisclosed grounds that the damages expert's methodology was flawed for failure to make unspecified deductions for costs. App. 123-126a. Thus the entire trial examination, cross examination, and redirect of Ryan occurred before CCQ had any notice of this motion to exclude on the basis of his methodology.

In making this *Daubert* objection after the close of evidence, Respondents relied on a document to support their challenge which had, according to Respondents' counsel, previously been submitted to the court without CCQ's knowledge. App. 133-135a. Prior to the disclosure in Respondents' oral argument on the motion, CCQ had no knowledge of the document, which was never served on CCQ, or its submission to the court. App. 134-135a. The document submitted *ex parte* to the court, before the oral motion to exclude, was a page from a damages treatise which purportedly addressed the issue of deducting costs to arrive at damages. App. 134a.

Without further analysis, the trial court thereupon excluded CCQ's expert damages testimony in its entirety, based on the argument that unspecified costs should have been deducted. App. 135-137a. There was no evidence, legal authority, or other discussion as to which, if any, costs were relevant to each of the claims in this case. The court made no specific findings, except that Ryan had not made additional deductions from his margin figures on past damages. In particular, no distinction was made between the various categories of damages Ryan testified to, such as depressed margins and the valuation of CCQ's business. App. 111-113, 117-120a. Nor were Ryan's stated reasons for not deducting additional costs from other damages addressed. *Id.* at 119-120, 122a. Ryan's reasons for stating that incremental expenses would be insignificant were never disputed by any opposing expert or other evidence.

In fact, less than five minutes elapsed between the oral *Daubert* motion on methodology and the exclusion of the expert witness. App 123-137a. The exclusion of Ryan, on an oral motion after the close of evidence, eliminated virtually all of CCQ's damages evidence. App. 139-141a.

Despite the exclusion of CCQ's damages expert, the jury found Club Car liable for its wrongful conduct to CCQ. App. 81a. Thus, unlike many *Daubert* cases, the exclusion of the expert did not affect the liability determination. It did drastically limit the amount of damages the jury could award to CCQ on its counterclaims. App. 139-141a.

CCQ filed a motion for a new trial, challenging Ryan's exclusion on substantive and procedural grounds. In denying this motion, the trial court, for first time, offered legal authority and cited accounting methodology factors supporting exclusion. These included the failure to discount *future* damages to present value, or to deduct incremental costs from future damages. App. 53a. Future damages theories were not argued in the case against Club Car at trial, but only damages from the 1993-2000 claims. App. App. 144-145a, ¶¶ 1, 3, 6, 7.

The order denying CCQ's motion for a new trial also cited a failure to adjust for inflation, a factor never mentioned in the *Daubert* argument at trial. App 55a. The order does not specify which damages should have been adjusted for inflation. At no time, either at trial or in post trial orders, have the present value or inflation factors been distinguished with respect to their impact on the 1993-2000 damages asserted by CCQ, as opposed to future damages.

The court also cited Ryan's failure to conform to accepted accounting procedures, though no evidence was offered by any accountant, or other witness, on that issue. App. 55a. The court further opined that Ryan did not conform to tax accounting principles, though no taxation issues were involved, and no evidence was offered at trial on this subject, either. *Id.*

Finally, the court criticized Ryan, for the first time in its post-trial order, for failing to deduct revenues that "would have been generated" despite Club Car's wrongful acts. App 53a. No evidence or authority was offered on this factor at trial. These

revenues, or the reasons for deducting them, have never been identified by Club Car or the trial court, at any time.

None of following issues cited by the trial court for the first time in the post-trial order, discounting to present value, adjustment for inflation, subtracting other CCQ revenues, procedures accepted by the accounting community, or methods of tax return preparation, were identified prior to Ryan's exclusion, and no evidence or argument was presented on any of them.

The trial court did cite in its order the same general statement concerning failure to deduct costs, but, as at trial, it did not identify the costs that allegedly should have been deducted with any specificity. Nor did it address in the order the reasons stated by Ryan, undisputed by any other evidence, for not deducting additional costs.

Despite the lack of analysis or findings in the trial record, and the lack of germane factors submitted after the trial to justify exclusion of the expert, the Eleventh Circuit dismissed CCQ's appeal argument saying the trial court "reasonably concluded [Ryan's] lost profit calculation was based on flawed methodology that was unaccepted in the accounting community." [3] App. 5a. The Eleventh Circuit did not address the lack of any evidence or authority as to what the accounting community did or did not accept, or the fact that Ryan

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[3] *Club Car, Inc. v. Club Car Quebec Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004)

testified to damages theories other than lost profits. App at 4-7a.

The Eleventh Circuit also approved the procedures followed by the trial court in making its ruling, as follows:

"The trial court permitted extensive voir dire and cross examination, then heard lengthy argument on Ryan's methods. The court adequately developed the record necessary to exercise sound discretion and did not err in holding the *Daubert* hearing during trial."[4] App. 6a.

The "lengthy argument on Ryan's methods" and "adequately developed record" from the "Daubert hearing held during trial" on --from the making of the oral motion on Ryan's methodology to the oral order in which the trial court "sustain[ed] the motion to strike [Ryan's] opinion as to damages"--is reproduced in its entirety at App. 125-137a.

The Eleventh Circuit also held that Respondents' *ex parte* "attempt by...counsel to submit an excerpt from a handbook on damages" was harmless because it did not involve presentation of evidence, but only of "legal authority in support of [Respondents'] argument."[5] App 6a.

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[4] 362 F.3d at 781.

[5] 362 F.3d at 781.

REASONS FOR GRANTING THE WRIT

Question 1. Does trial court discretion allow admissibility of expert evidence to be determined on the basis of factors that are not relevant either to the testimony or to facts and issues in the case?

The job of the trial court under Rule 702 of the Federal Rules of Evidence is to ascertain whether expert testimony "pertain[s] to a fact at issue in the case" and whether the expert's "reasoning or methodology can be applied to the facts in issue."[6] To serve that function in all cases, this must be a flexible inquiry.[7] However, the gatekeeping inquiry must be "tied to the facts of a particular case."[8] By the same token, the trial court's admissibility analysis should also have "a valid...connection to the pertinent inquiry."[9]

By contrast, the trial court here excluded CCQ's damages expert, Peter Ryan, for failure to deduct unspecified costs, without any analysis tied to the facts of the case. In its first articulation of the factors it considered to find Ryan's methodology flawed, in response to *post-trial* motions, the trial court enumerated a series of factors with absolutely no relevance to the issues argued at trial. It faulted Ryan for failing to discount future damages to present value, though CCQ made no claim of future damages against

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[6] *Daubert*, 509 U.S. at 592-93, 113 S.Ct. at 2796.
[7] 509 U.S. at 594, 113 S.Ct. at 2797.
[8] 509 U.S. at 591; *Kumho Tire v. Carmichael*, 526 U.S. 137, 150, 119 S.Ct. 1167, 1175 (1999)
[9] *Kumho Tire*, 526 U.S. at 149, 119 S.Ct. at 1175.

Club Car at trial.[10] App. 53, 143-145a. The court also cited Ryan's failure to adjust for inflation, another factor with no discernible bearing on past damages--unless it means they should have been increased. [11] Similarly, the trial court's undirected recitations concerning revenues CCQ would have had despite Club Car's misconduct cannot be matched up with any specificity to CCQ's past damages or any other facts or issues in the case. App. 53, 55a.

This lack of fit is not surprising given the total absence of evidence or argument that marred this determination of admissibility.[12] The entire record of the *Daubert* objection based on Ryan's methodology consists of an oral motion after the close of evidence (App. 123-136a), followed by a discussion whether such a tardy challenge can be brought without a more searching examination of the witness' testimony through the adversarial process. App 127-131. At the conclusion of that colloquy the trial court *admits* the expert evidence. App. 131a.

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[10] Even if future damages theories had been argued at trial, the present value discount would apply to those damages only, not to past damages, from 1997 to 2000, which were central to the case, and certainly would not be a basis to "sustain the motion to strike [Ryan's] opinion as to damages." App. 137a. The trial court never made any such distinction between past and future damages, either at trial or post-trial, and neither did the Eleventh Circuit.

[11] It is not altogether clear how this inflation-adjustment factor should have been applied to the future damages with which the court was purportedly concerned, either.

[12] As considered more fully elsewhere, these analytical shortcomings were exacerbated by the tardiness of Respondents' *Daubert* challenge, which was not made until the last day of trial.

That ruling is followed by a renewed oral objection from Respondents' counsel, culminating in the disclosure of an "attempt by [Respondents'] counsel to submit" *ex parte* "legal authority in support of his argument." App. 131-135a; *Id.* at 6a.[13] After a brief discussion in which the trial court dismisses CCQ's argument that Club Car failed to put up any expert evidence that Ryan's accounting methodology departed from accepted standards, the trial court stuck Ryan's expert opinion evidence on damages *in its entirety.* App. 137a. The hearing concludes with a discussion of whether the court has directed a verdict since no damages evidence remains in the case. App. 137-142a. CCQ's attempted objections are cut off when the trial court states it has "heard enough." App. 141.

That brief record can be searched in its entirety without finding any exacting analysis of the fit between the expert evidence and the claims and issues in the case. As Justices of this Court have previously stated, the trial court's latitude in performing the gatekeeping function is "not discretion to perform the function inadequately."[14]

The Eleventh Circuit, however, ignored both the failure to consider relevant factors in the *Daubert* analysis and the failure to establish a record.[15] Before excluding CCQ's expert damages testimony, the court never did identify which costs should have been

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[13] *Club Car, Inc. v. Club Car Quebec Import, Inc.*, 362 F.3d 775, 781 (11th Cir. 2004).

[14] *Kumho Tire*, 526 U.S. 137, 152, 119 S.Ct. 1167, 1175 (Justices Scalia, O'Connor and Thomas concurring).

[15] 362 F.3d at 780-81

deducted or how they applied to theories of liability as diverse as breach of fiduciary duty and failure to pay commissions.[16] The post-trial rationales, such as failure to adjust for inflation, departed entirely from the cost-deduction issue the court relied on at trial.[17] Thus these later-identified factors only compounded the confusion promulgated at trial.

Neither the trial court nor the Eleventh Circuit ever considered the reasons given by the expert, who handled CCQ's business affairs for twenty years, for not deducting additional costs.[18] Moreover, this Court has already established that failure to consider all possible cost variables in a study goes to the weight of the evidence, not its admissibility.[19] Therefore, the main rationale supported by the Eleventh Circuit for excluding the witness was not a proper consideration for admissibility. Club Car was free to attack Ryan's conclusions on cross examination,[20] which it did, or to

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[16] *Goebel v, Denver & Rio Grande Western RR Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000)(without specific findings or discussion on the record, it is impossible to determine whether the district court meticulously reviewed the expert evidence "or simply made an off-the-cuff decision."

[17] *Padillas v. Stark-Gamco, Inc.*, 186 F.3d 412, 417-18 (3rd Cir. 1999) ("side trying to defend the admission of an expert must be given an adequate opportunity to do so").

[18] App. 118, 120, 122a (specifically finding, uncontradicted by any other evidence, that incremental costs from additional sales would be minimal).

[19] *Bazemore v Friday*. 478 U.S. 385, 400, 106 S.Ct. 3000, 3009 (1986) (failure to consider all cost variables goes to probativeness, not admissibility).

[20] *Daubert* makes it clear that the Rule 702 analysis is not intended to supplant the role of cross examination and presentation of evidence on disputed issues. 509 U.S. at 596, 113 S.Ct. at 2798.

offer expert evidence that the methodology was unsound, which it did not.

The Eleventh Circuit must be reversed for the legal error in excluding the expert for a cost deduction rationale that is contrary to the precedent of this Court in *Bazemore v. Friday*. More importantly, this case cannot be allowed to set a precedent for straying beyond the analysis of relevant factors in performing the Rule 702 gatekeeping function. The boundaries set by *Daubert* and *Kumho Tire* are wide, but the Eleventh Circuit strayed far outside them when it allowed past damages to be excluded because future damages—of which none were presented to the jury--were not discounted to present value. Analysis of expert testimony must be brought back inside the lines shaped by the requirement that the evidence, and the admissibility analysis of that evidence, must fit the facts and issues of the case.

Question 2. May the trial court make a determination on admissibility of expert evidence in the total absence of opposing expert testimony or other evidence or authority properly before the court?

In keeping with the "fit" requirements of *Daubert*, it would appear that "off-the cuff" judgments by the trial court have no place in this inquiry.[21] In this case, however, the trial court had nothing else on which to rely.

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[21] *Goebel*, 215 F.3d at 1088.

There was absolutely no evidence before the court on accounting standards, and certainly no evidence that Ryan's methodology did not satisfy those standards. In this case, the court's failure to dig deeper left unexposed the fact that Club Car's opposing accounting expert, who was not called to testify, did not disagree with Peter Ryan's methodology. It also did not take into account Ryan's own explanations for why he did not deduct additional costs from his margin figures. App. 118, 120, 122a. This is a danger that lurks wherever the inquiry is limited to the trial judge's own understanding without the aid of opposing expert evidence.[22]

Despite these obvious shortcomings, the Eleventh Circuit found the court "adequately developed the record to exercise sound discretion."[23] App. 6a.

At trial, however, the only legal authority offered for exclusion of the witness was not properly before the court. This consisted of a page from a damages treatise which, according to Respondents' counsel, was "given to the court earlier," without CCQ's knowledge, and before any objection to admissibility for failure to deduct costs. App. 133-134a.

The Eleventh Circuit dismissed the importance of Club Car attempting to make an argument to the court of which CCQ had no notice. The Eleventh Circuit justified this action by saying that the

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[22] App 129 & 58a (it's "common sense), 55a (trial judge's personal knowledge of tax accounting).

[23] *Club Car*, 362 F.3d at 781.

document, given to the court under unknown circumstances, was "not evidence, but legal authority supporting [Respondent]'s argument."[24] App 6a. Surely the Eleventh Circuit cannot be correct that *ex parte* legal argument is acceptable during the course of a trial.

Professionalism considerations aside, this method of advancing arguments flies in the face of the exacting analysis requirements of *Daubert*. Take away the questionable submission and there was no legal authority whatsoever offered, before the court's ruling, in support of excluding the witness. The authority cited in the later orders was not identified prior to Ryan's exclusion, and was never applied to these facts or otherwise tested in the adversarial process.

While the procedural and substantive requirements of *Daubert* must remain flexible to fit the facts and issues of any case, a bright line can be drawn here: that there must be some evidence or authority before the court to analyze prior to its ruling. Where,

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[24] *Id.* In addition, the Eleventh Circuit termed this a question of whether CCQ was properly served. However, this is not a case in which CCQ had timely notice of the argument to the court in advance of the motion, but merely was not served properly. CCQ had no knowledge of the document, its transmission to the court, or the coming motion to exclude which the document was submitted to support. When legal authority is submitted to the court in advance, without CCQ's knowledge, and the ruling turns on the argument advanced, that is not merely an issue of whether CCQ was "properly served." *Id.*

as here, there was nothing properly before the court to consider, that should be ruled an abuse of discretion.[25]

Question 3. May such factors and analyses supporting exclusion be supplied after the court has already ruled, without first affording the opportunity to present germane argument and evidence?

This case is notable for more than the lack of a fit between the issues in the case and the factors justifying exclusion of the expert, or for the tardiness of the challenge, the absence of opposing evidence, and the brevity of the proceedings. What is truly remarkable is that the factors justifying the court's ruling—such as the failure to discount *past* damages to present value--were never identified until after the ruling excluding the expert was already made. The same is true of the legal authority cited by the trial court in its post-trial order. It was never cited or argued prior to Ryan's exclusion.

There is an inherent danger in this that may not be understated. While the failure to tailor the analysis to the facts and issues in the case is by itself an abuse of discretion, permitting after-the-fact justification is only asking for abuse.

By their very nature, supporting rationales which are not identified until after a ruling is already

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[25] This Court can also draw the bright line the Eleventh Circuit failed to draw, that legal authority not properly before the court is inexcusable and cannot be, or even appear to be, a basis for exclusion.

made, cannot be tested by the adversarial process. There can be no presentation of facts or arguments to probe the fit between the factors cited and the facts of the case. There can be no opportunity to distinguish legal authority *vis à vis* the facts of the case. By definition, there could not possibly be any "exacting analysis," as required under *Daubert*.

Such post facto justifications only undermine the credibility, legitimacy, and appearance of impartiality that are essential to federal court proceedings.

No other case could better illustrate the extreme danger such proceedings pose to the judicial system itself. Conclusory, after-the-fact rationales for exclusion, that have never passed muster in the adversarial process, must be deemed an abuse of discretion.

Question 4. May the party seeking exclusion, without excuse, withhold its objection, and any notice of its basis, from the party offering the expert testimony until the conclusion of the trial?

The Eleventh Circuit opinion never addressed the question why Club Car filed a *Daubert* motion on the last day of trial after letting the motion *in limine* deadline pass, after failing to give any prior notice, and after presenting no opposing expert evidence of its own.

This encourages a lack of professionalism, and weakens the adversarial process. The predictable result of such surprise objections is the slipshod analysis and shoddy procedure demonstrated in the

instant case, where evidence of past damages was excluded because it was not "discounted to present value." This cannot be the course courts follow, or the ambush tactics parties are allowed to use, in determining admissibility under *Daubert*.

The prejudice one might predict from allowing such tardy motions was borne out in this case, a breakdown in the adversarial process evidenced by the total absence of a developed record, authority properly before the court, exacting analysis that fit the facts and issues in the case, or specific findings by the court. The Eleventh Circuit never considered any of these issues, merely citing the trial court's unfettered discretion in the timing of *Daubert* proceedings, where clearly a bar to such unprofessional tactics was called for, instead.

The Tenth Circuit, in addressing such dilatory tactics, stated that "only in rare circumstances" should such "tardy motions" even be considered by the court.[26] The Tenth Circuit noted that "the law does not traditionally reward ambush trial tactics," and that "Daubert generally contemplates a gatekeeping function, not a 'gotcha' function."[27] In *Goebel*, as here, the defendant missed the motion *in limine* deadline and moved to strike the expert after the plaintiff rested.[28]

This Court should establish a procedural line that bars such abuses from occurring under the guise of trial court discretion. It can do so by adopting the Tenth Circuit's suggestion that *Daubert* challenges filed after

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[26] *Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1087 (10th Cir. 2001).
[27] *Id.*
[28] *Id.* at 1086.

motion *in limine* deadlines set by the court, without any justification offered, be barred as untimely. Otherwise, parties will be free to follow Club Car's example in abusing the procedural flexibility of the *Daubert* inquiry to gain an unfair advantage, partly, as here, from the confused nature of the resulting last-minute trial proceedings.

Question 5. May an expert witness with twenty years of experience with the subject matter of his testimony be excluded on the basis that he has never before served as an expert witness?

Prior to excluding CCQ's expert damages testimony based on methodology, the trial court excluded Ryan for lack of prior experience as an expert witness. App 109a. This basis for exclusion is troubling just because the law is so clear that one does not have to be a professional expert witness to be qualified.[29] The exclusion of Ryan on his qualifications is a clear and reversible error of law that was never addressed by the Eleventh Circuit. This blatant legal error was a prescient and glaring symptom of the confused proceedings on methodology that were about to follow. Such haphazard conduct of *Daubert* proceedings should be held an abuse of discretion.

CONCLUSION

The reason *Daubert* has remained a flexible inquiry is so that courts can tailor their procedures and substantive inquiries to the facts and issues in the

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[29] Fed. R.Evid. 702 (expert can be qualified by experience in the field).

whole spectrum of cases that come before them. That is the correct approach, and this Court should not tamper with that flexibility as long as it is directed to those purposes. However, when that discretion and flexibility becomes a shield for failing to tailor the factors analyzed to the issues relevant to the claims in case, that is where this Court must step in and draw the line by calling that an abuse of discretion. And the Eleventh Circuit opinon in the instant case, above all, must not become the bellwether for "anything goes" in *Daubert* admissibility determinations—late filings, *ex parte* communications, absence of authority, failure to make specific findings, after-the-fact justifications, and consideration of factors irrelevant to the claims in the case--under the guise of trial court discretion.

The Supreme Court should accept this petition for certiorari not because this case presents a difficult, close, or intellectually challenging question, but because it presents a question that is so stark and simple, but urgently in need of clarification to prevent abuse, and to preserve the integrity of this Court's decisions in *Daubert* and *Kumho Tire*. There simply must be minimum standards of fairness, openness, and relevance in *Daubert* proceedings.

The factors considered must fit the facts of the case. The court must develop a truly adequate record to determine admissibility. Absent some surprise development, the challenge should be timely, with evidence and authority presented on a timely basis and fairly argued, without even the appearance of impropriety in the proceedings.

For these reasons and those set forth above, the petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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Attorneys for Petitioners

(any footnotes trail end of each document)
No. 03-11169
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CLUB CAR, INC.,
Plaintiff-Counter Defendant-Appellee,

Versus

CLUB CAR (QUEBEC) IMPORT, INC., MARTIN MURPHY,
Defendant-Counter Claimant-Appellant,

MARTIN MURPHY,
Defendant-Appellant,

PIERRE CHAMPIGNY, EQUIPMENTS PIERRE CHAMPIGNY, LTD.,
Counter-Defendants-Appellees,

INGERSOLL RAND CO., LTD.,
Counter-Defendant.

March 15, 2004, Decided
March 15, 2004, Filed

COUNSEL: For Club Car (Quebec) Import, Inc, Appellant: Penn, Darren W., ATLANTA, GA.

For Murphy, Martin, Appellant: Humphrey, Stephen, Cook, Noell, Tolley, Bates & Michael, LLP, ATHENS, GA. Scherffisu, Andrew M., ANDREW M. SCHERFFIUS, P.C., ATLANTA, GA. Harris, Jeffrey R., Butler, Wooten, Overby, et al., Savannah, GA.

For Club Car, Inc, Appellee: Ellington, James B., Hull, Towill, Norman & Barrett, Augusta, GA.

For Pierre Champigny, Appellee: Snell, Amy R., Fulcher, Hagler, Reed, et al, AUGUSTA, GA.

JUDGES: Before EDMONDSON, Chief Judge, BIRCH and FARRIS *, Circuit Judges.

OPINIONBY: FARRIS

OPINION: FARRIS, Circuit Judge:

Club Car of Quebec (CCQ) and its president, Martin Murphy, appeal the judgment against them on several claims arising out of Club Car Inc.'s termination of CCQ as its distributor of golf carts. We affirm.

Background

Under a series of written distribution agreements, CCQ, a Quebec corporation, served as the Quebec distributor of golf carts manufactured by Club Car, a Georgia corporation, from 1980 through 2000. In 1990 and 1991, CCQ president Martin Murphy executed a personal guaranty to ensure payment of CCQ's debts.

During the 1990's Club Car and CCQ agreed that Club Car could sell used carts in Quebec, but that CCQ would have a right of first refusal on those products. If CCQ declined to purchase them, it would receive a commission on each cart Club Car sold to another buyer. Disagreements later arose when Club Car began selling used carts containing new parts to a competitor, Equipements Pierre Champigny (EPC). This

arrangement ended in 1997, but Club Car continued selling used carts.

In 1999, Club Car began charging CCQ a Quebec Provincial Sales Tax (QST) for its products with the stated intent of remitting the taxes to the Quebec Government. For various reasons, Club Car delayed paying the taxes until June of 2001. CCQ claims it suffered tax penalties as a result of this delay.

In 2000, Club Car terminated its contract with CCQ and awarded the distributorship to EPC, whose president is Pierre Champigny. Later, Club Car filed suit to recover more than $ 1.5 million in payments due from CCQ and from Murphy under the personal guaranty. CCQ and Murphy filed three lengthy counter claims against Club Car asserting, among other claims, breach of contract, conspiracy to breach a contract, and conversion arising out of the distribution agreement, as well as breach of fiduciary duty, violations of federal and state RICO laws, and fraud arising out of Club Car's mishandling of the QST taxes. CCQ later joined EPC and Champigny as counterclaim defendants, alleging tortious interference with a business relationship and contract, and conspiracy to breach a contract.

On January 17, 2003, the trial court granted Club Car's motion for partial summary judgment, dismissing CCQ's RICO and fraud claims, and its breach of contract claim connected with the alleged used cart agreement. On January 31, EPC and Champigny moved to apply Quebec law to CCQ's claims against them. On February 3, CCQ moved to amend the pretrial order, agreeing to limit its claims against Club Car to breach of contract, conspiracy to breach a contract, breach of

fiduciary duty, and promissory estoppel, and to limit its claims against Champigny and EPC to conspiracy to breach a contract and tortious interference with a business relationship and contract. On February 4, the trial court accepted CCQ's limitation of claims and granted EPC and Champigny's request to apply Quebec law.

After a five-day trial, a jury awarded Club Car $ 1,557,360 (Canadian) on its claims against CCQ and Murphy. The jury awarded CCQ $ 100,000 (Canadian) on its counterclaims against Club Car, but nothing on its claims against EPC and Champigny. The jury did not award attorney fees to either Club Car or CCQ. After trial, the trial court granted Club Car's motion for judgment as a matter of law and awarded Club Car attorney fees under the distribution contract.

DISCUSSION

1. Damages Testimony. n1

CCQ challenges rulings excluding testimony on the alleged damages connected with its various counter claims. It first contends that the trial court abused its discretion in striking the expert testimony of its accountant, Peter Ryan, on lost profits under Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). We review such rulings for abuse of discretion, Judd v. Rodman, 105 F.3d 1339, 1341 (11th Cir. 1997), and will reverse only if an erroneous ruling created a "substantial prejudicial effect." Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1305 (11th Cir. 1999) (citations omitted).

Expert testimony is admissible if (1) the expert is qualified to testify on the topic at issue, (2) the methodology used by the expert is sufficiently reliable, and (3) the testimony will assist the trier of fact. ER 703; Quiet Tech. DC-8 v. Hurel-Dubois UK, Ltd., 326 F.3d 1333, 1340-41 (11th Cir. 2003). To ensure that a proper foundation is made, the trial court must screen expert testimony to determine if it is relevant and reliable. Daubert, 509 U.S. at 589. Expert testimony must be excluded if the reasoning or methodology underlying the opinion is scientifically invalid, or if the methodology cannot properly be applied to the facts. Id. at 592.

Ryan testified that CCQ's damages in the form of lost profits exceeded $ 10 million. But, as the trial court found, that estimate was based on gross sales and gross profit figures. Ryan admitted he had not factored in expenses CCQ would normally incur in generating income and sales. To recover lost profit damages in Georgia, "one must show the probable gain with great specificity as well as expenses incurred in realizing such profits. In short, the gross amount minus expenses equals the amount of recovery. " Shaw v. Ruiz, 207 Ga. App. 299, 428 S.E.2d 98, 103 (1993) (citations omitted). Ryan failed to follow this rule. The trial court reasonably concluded his lost profit calculation was based on flawed methodology that was unaccepted in the accounting community. *See* Daubert, 509 U.S. at 593-94 (degree to which experts in the field accept technique relevant to admissibility). The court did not abuse its discretion in striking the testimony.

CCQ argues the *Daubert* objection was untimely because it was not raised until trial. A *Daubert*

objection not raised before trial may be rejected as untimely. Quiet Tech., 326 F.3d at 1350. But a trial court has broad discretion in determining how to perform its gatekeeper function, and nothing prohibits it from hearing a *Daubert* motion during trial. *See* Goebel v. Denver and Rio Grande Western R.R. Co., 215 F.3d 1083, 1087 (10th Cir. 2000)(trial court may hold *Daubert* hearing "when asked to rule on a motion in limine, on an objection during trial, or on a post-trial motion. . . ."); *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) ("the trial judge must have considerable leeway" in determining whether expert testimony is reliable). The trial court permitted extensive voir dire and cross examination, then heard lengthy argument on Ryan's methods. The court adequately developed the record necessary to exercise sound discretion, and did not err in holding the *Daubert* hearing during trial. CCQ argues the trial court's ruling was based on improper evidence, pointing to the attempt by EPC's counsel to submit an excerpt from a handbook on damages. CCQ claims this tainted the court's ruling because the excerpt was not properly served on the parties. This contention is without merit: The excerpt was not "evidence" but legal authority in support of EPC's argument. Moreover, the trial court indicated it had not even seen the excerpt when it made its ruling.

CCQ next complains that the trial court confused the jury in striking Ryan's lost-profit testimony as follows:Members of the jury, with respect to Mr. Ryan's testimony as to damages, when he says that he did not take into consideration the expenses involved and merely used the gross amount, his opinion as to the loss on the Defendant's counterclaim is stricken. You are not

to consider that.CCQ claims the instruction failed to distinguish between lost profit and other damages, thereby misleading the jury into disregarding all of Ryan's testimony. Since CCQ failed to object to the instruction, reversal is required only if it can show plain error. Fed. R. Civ. P. 51; Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1287-88 (11th Cir. 2002). Although not a model of clarity, the instruction did refer to Ryan's conclusions that failed to account for CCQ's expenses. The instruction was not so misleading as to clearly prejudice CCQ. Ford, 289 F.3d at 1288.

Finally, the trial court did not commit reversible error in sustaining Club Car's objection to Ryan's testimony on losses CCQ allegedly suffered from Club Car's handling of QST taxes. CCQ vice president Anita Murphy had already testified that CCQ incurred more than $ 200,000 in fines and expenses due to Club Car's failure to remit QST to the Quebec Government. Ryan's testimony was cumulative and its exclusion was harmless. Piamba Cortes, 177 F.3d at 1305.

2. Jury Instructions .

CCQ claims the trial court abused its discretion in the "process and substance" of instructing the jury, focusing mainly on the relationship between Quebec law and its claims. It first argues that the trial court's "untimely" decision to apply Quebec law to its claims against EPC and Chamigny "spawned confusion" and prejudice. This argument is without merit. To avoid unfair surprise, a party must give reasonable notice, through its pleadings or otherwise, of its intent to rely on foreign law. Fed R. Civ. P. 44.1; DP Aviation v. Smiths Industries Aero. & Def. Sys., 268 F.3d 829, 846 (9th Cir. 2001). EPC gave

CCQ such notice at least twice, starting two weeks before trial. Moreover, in granting EPC's request, the court did not "change" the law; it simply applied well-established choice-of-law principles to claims that CCQ, a Quebec party, had against other Quebec parties. CCQ received reasonable notice. DP Aviation, 268 F.3d at 846.

Nor did the trial court err in denying CCQ's request to amend the pretrial order a second time so that it could reassert claims for defamation and bad faith business negotiations under Quebec law. "For pretrial procedures to continue as viable mechanisms of court efficiency, appellate courts must exercise minimal interference with trial court discretion in matters such as the modification of its [pretrial] orders." Jacobs v. Agency Rent-A-Car, Inc., 145 F.3d 1430, 1432 (11th Cir. 1998) (quoting Hodges v. United States, 597 F.2d 1014, 1018 (5th Cir. 1979)). CCQ had agreed to drop those claims before trial in order to streamline its lengthy list of counter claims. The court did not abuse its discretion in refusing to amend the pretrial order again after trial had begun.

We also find no reversible error in the trial court's refusal to give CCQ's proposed Quebec law instructions on its breach of fiduciary duty and conspiracy claims against Club Car. For the most part, the instructions CCQ proposed merely added the following statements to the Georgia version of the law:Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in his duty,

he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral, or material in nature.This added little to the instructions given, which already stated that Club Car had a legal duty to refrain from conspiring to breach its contracts, and a duty to fulfill its fiduciary obligations by using reasonable care in handling QST funds collected from CCQ. Assuming Quebec law applied to the claims, any error in refusing to give CCQ's proposed instructions is harmless since they would not have altered the thrust of what the jury was told. *See* Carter v. DecisionOne Corp., 122 F.3d 997, 1005 (11th Cir. 1997) (instructional error does not require reversal unless we are "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.") (quoting Johnson v. Bryant, 671 F.2d 1276, 1280 (11th Cir. 1982)).

CCQ also claims, with little analysis or citation to relevant authority, that the trial court gave various flawed Quebec law instructions. But CCQ fails to show how, considered as a whole, the instructions misstated the law or misled the jury. Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1569 (11th Cir. 1991).n2

Nor did the trial court violate Fed R. Civ. P. 51 by failing to hold a proper charge conference or allow CCQ sufficient time to review and object to proposed instructions. Before closing arguments, the trial court held a hearing at which all parties argued the instructions. Although the court abbreviated the hearing, it gave the parties an additional opportunity to object and propose new instructions after the jury was charged. The proceedings were consistent with Fed. R. Civ. P. 51.

3. QST Claims

CCQ argues that the trial court erred in dismissing on summary judgment its state RICO and fraud claims connected with Club Car's handling of the QST it collected. We review summary judgment rulings de novo, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. Tullius v. Albright, 240 F.3d 1317, 1319 (11th Cir. 2001). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." Clemons v. Dougherty County, 684 F.2d 1365, 1369 (11th Cir. 1982).

To establish a pattern of racketeering activity under Georgia's RICO statute, CCQ needed to prove two related predicate acts that violated state or federal law. Ga. Cod. Ann. § 16-14-3(8), (9); Roth v. Connor, 235 Ga. App. 866, 510 S.E.2d 550, 557 (1998). n3 CCQ alleged that Club Car committed mail fraud, which requires proof of a specific intent to defraud or deceive. 18 U.S.C. § 1341; United States v. Hasner, 340 F.3d 1261, 1269 (11th Cir. 2003). CCQ's common law fraud claim has a similar scienter element. Empire Distr. Inc. v. Hub Motor, 240 Ga. App. 568, 524 S.E.2d 264, 265 (1999).

In support of summary judgment, Club Car presented evidence that it began collecting QST on the advice of its customs auditor in the Spring of 1999. Club Car's accountant explained the delay in remitting the tax by

averring that: (1) shortly after Club Car began collecting QST, she was notified she could not remit the tax without a Quebec Provincial tax identification number; (2) she was not diligent in applying for the number because she was overworked and having personal problems; (3) the Quebec government rejected a defective application submitted in the Fall of 2000; (4) she resubmitted a corrected application in December 2000; and (5) an identification number was issued to Club Car in May 2001. All taxes were paid in June 2001, before CCQ filed its counterclaim alleging fraud.

In response, CCQ was required to come forward with "specific facts showing that there [was] a genuine issue for trial." Fed. R. Civ. P. 56(e). Instead, CCQ asserts only that the delayed payment raised an inference of fraudulent intent, and refers to what it claims are invoices containing false tax numbers submitted by Club Car. But the delay was explained by Club Car's affidavits. Moreover, CCQ does not identify the invoices that allegedly contain false numbers. There were invoices containing a tax number associated with the financing entity for the transaction, which was listed as "buyer" on the invoices. CCQ fails to show how listing the tax number of a clearly-identified party evidences fraudulent intent. At best, this is nothing more than a scintilla of evidence and is insufficient to defeat summary judgment. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Contrary to CCQ's claim, the affidavit of Anita Murphy, which asserted that Club Car had falsified tax numbers and was unauthorized to collect QST, does not establish a question of fact as to intent. The trial court correctly

disregarded this averment as barred by the hearsay rule because Murphy had attempted to relay what she claimed Quebec government officials had told her. Inadmissible hearsay generally cannot be considered on a motion for summary judgment. Macuba v. Deboer, 193 F.3d 1316, 1322 (11th Cir. 1999).

CCQ also asserts that summary judgment was improperly granted because the trial court had erroneously denied CCQ's request to depose certain Club Car employees on the QST issue. CCQ fails to explain how the discovery rulings were erroneous or how the witnesses would have supported its claims. *See* Flanigan's Enterprises, Inc. v. Fulton County, 242 F.3d 976, 987 n.16 (11th Cir. 2001) (party's failure to elaborate on or provide any citation of authority in support argument constitutes waiver) (citation omitted); *see also* Fed. R. App. P. 28(a)(9)(A). n4

CCQ next contends that the trial court erred in excluding the trial testimony of Lynda Cappadoccia of the Quebec government on the QST issue. The trial court made no such ruling. Instead, a magistrate denied CCQ's pretrial request to take Cappadoccia's videotaped deposition for trial, a ruling that CCQ failed to appeal to the district court. *See* Farrow v. West, 320 F.3d 1235, 1248-49 n.21 (11th Cir. 2003) (failure to appeal magistrate's nondispositive order to the district court precludes party from raising issue on appeal to the circuit court).

Finally, CCQ argues that the trial court abused its discretion in excluding as hearsay Anita Murphy's testimony that Quebec tax officials "had learned" that

Club Car used false tax numbers and was unauthorized to collect QST. These were "out of court statements offered to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The trial court properly excluded them. *See* Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1554 (11th Cir. 1995) (trial court has broad discretion in determining admissibility of evidence).

4. Personal Jurisdiction: Murphy.

Martin Murphy argues that the district court lacked personal jurisdiction because he is a resident of Quebec without sufficient minimum contacts with Georgia. The Georgia long-arm statute provides for personal jurisdiction over a nonresident defendant who "transacts any business within this state." Ga. Code Ann. § 9-10-91(1). The statute confers jurisdiction to the "maximum extent permitted by due process." SES Indus., Inc. v. Intertrade Pack. Mach. Co., 236 Ga. App. 418, 512 S.E.2d 316, 318 (1999). Due process requires that a defendant have sufficient minimum contact with the forum state to provide "fair warning that a particular activity may subject him to the jurisdiction of a foreign sovereign." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citation omitted). In determining whether sufficient minimum contacts exist, we look to whether: (1) the defendant has acted so as to avail himself of the law of the forum state; (2) the claim is related to those acts; and (3) the exercise of jurisdiction does not violate notions of fair play and substantial justice. SES Indus., 512 S.E.2d at 318.

A nonresident individual cannot be subject to personal jurisdiction based solely upon acts in Georgia taken in

his or her corporate capacity. Southern Electronics Distrib. v. Anderson, 232 Ga. App. 648, 502 S.E.2d 257, 260 (1998). Murphy's contacts with Georgia went beyond his visits to the state as CCQ president. Murphy engaged in negotiations with Club Car for the underlying distribution agreements as well as the personal guaranty. As the trial court found, Murphy was more than a passive participant in CCQ's dealings in Georgia. As principal and primary shareholder of CCQ, Murphy enjoyed the substantial financial benefit from the distribution agreement, which he induced Club Car to enter by personally guaranteeing CCQ's debts. Notably, the distributorship agreement and the personal guaranty contract, in effect for many years, provided for their enforcement in the state of Georgia, under Georgia law. These circumstances establish that Murphy acted to avail himself of Georgia law, the claim is related to those acts, and it was fair for Georgia to assert jurisdiction over him. *See* White House v. Winkler, 202 Ga. App. 603, 415 S. E. 2d 185 (1992). The trial court correctly found that Murphy had sufficient minimum contacts with Georgia.

5. Attorney Fee Award-Validity of Personal Guaranty

Finally, CCQ and Murphy challenge rulings awarding attorney fees to Club Car and rejecting Murphy's claims that the personal guaranty contract was unenforceable. Both issues arose in rulings on motions for judgment as a matter of law entered after the initial judgment was entered and the initial notice of appeal was filed. In light of this, CCQ and Murphy were required to amend their notice of appeal to designate the rulings and amended judgment affected by those rulings. Fed. R. App. P. 4(a)(4)(B)(ii). They amended their notice, but failed to

designate the rulings and judgment they now challenge.

Fed. R. App. P. 3(c) requires a notice of appeal to "designate the judgment, order or part thereof appealed from." We have jurisdiction to review only those judgments or orders specified-expressly or impliedly-in the notice of appeal. Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1374-75 (11th Cir. 1983). Where a notice of appeal specifies a particular judgment or ruling, we infer that others are not part of the appeal. Id. The failure to designate the post-trial rulings on attorney fees and the personal guaranty precludes CCQ and Murphy from challenging them in this appeal. n5

AFFIRMED.

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

n1 Martin Murphy joins in all of CCQ's claims that would result in an offset of the jury's award to Club Car under his personal guaranty.

n2 CCQ also claims the court erroneously instructed the jury that "all tortious conduct by Club Car and Champigny. . . had to occur in the state of Georgia" for the jury to award damages. The court gave no such instruction. It did instruct the jury that punitive damages could only be based upon conduct occurring in Georgia.

n3 Under Ga. Code Ann. § 16-14-4(a), Georgia's RICO statute:it is unlawful for any person, through a pattern

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of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.

n4 CCQ tests the limits of Fed. R. App. P. 28(a)(9)(A) throughout its briefs.

n5 Murphy's challenge to personal jurisdiction is not similarly-barred because he raised the issue in at least two pretrial motions to dismiss. "The appeal from a final judgment draws in question all prior non-final orders and rulings which produced the judgment." Barfield v. Brierton, 883 F.2d 923, 930 (11th Cir. 1989).

CIVIL ACTION NO. CV100-195

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
AUGUSTA DIVISION

CLUB CAR, INC.,
Plaintiff,

v.

CLUB CAR (QUEBEC) IMPORT, INC., and
MARTIN MURPHY,
Defendants.

and

CLUB CAR (QUEBEC) IMPORT, INC.,
Counterclaim Plaintiff,

v.

CLUB CAR, INC., PIERRE CHAMPIGNY,
EQUIPEMENTS PIERRE CHAMPIGNY, LTD.,
and INGERSOLL RAND CO.,
Counterclaim Defendants.

5/4/2003

O R D E R

Club Car Quebec ("CCQ") and Martin Murphy have filed motions for a new trial under Rule 59 and for judgment as a matter of law under Rule 50 (b).
On February 14, 2003, a jury returned a verdict in favor

of Plaintiff, Club Car, Inc. ("Club Car"), on its claims against CCQ and Murphy and against CCQ in its counterclaims against Pierre Champigny and Equipements Pierre Champigny, Ltd. ("IEPCII").[1] For the reasons that follow, the Court will DENY the Rule 50 and Rule 59 motions of Murphy and CCQ.

BACKGROUND

Club Car designs and manufactures golf carts and their parts for sale or lease through authorized distributors and direct channels. From the early 1980s until 2000, CCQ was an authorized distributor of Club Car's golf carts and parts pursuant to a series of distributorship agreements. Murphy is the president and principal shareholder of CCQ.

Under the distributorship agreements, which continued until September 1, 2000, CCQ distributed Club Car's golf carts and parts in Quebec and elsewhere in Canada. The distributorship agreements provided that CCQ would order new golf carts and parts from Club Car in Augusta, Georgia, for delivery either to CCQ's principal place of business or directly to its customers. Club Car extended a credit line to CCQ in the course of their business relationship, and the parties regularly exchanged orders, payments, and commissions. In 1990, Club Car and Murphy executed a personal guaranty to ensure payment by either Murphy or CCQ on golf carts and parts ordered by CCQ and provided by Club Car on credit.

In the early 1990s, Club Car and CCQ reached an oral agreement under which CCQ would have a right of first refusal on all of Club Car s used golf carts sold within

its territory. If CCQ declined to purchase the used carts under its right of first refusal, it would receive a $100 commission on each cart subsequently sold in its territory. A disagreement over the nature of the arrangement arose in 1996 and resurfaced again in June 1997, when Murphy wrote to Ray Bentley[2] to complain about the sale of used golf carts to Pierre Champigny. After consulting with his supervisors, Bentley elected to end the used cart arrangement between Club Car and CCQ. Murphy was notified by letter that the arrangement would end on December 31, 1997.[3] Despite the urging of Murphy at a sales seminar in August 1997, Bentley declined to reconsider the decision to terminate the arrangement.

In addition to the distributorship agreements concerning golf carts, Club Car and CCQ also engaged in a series a written agreements concerning the distribution of utility vehicles, or "carryall" vehicles.[4] The last distributorship agreement concerning carryall vehicles expired on February 28, 1989.

In 1998, an interest arose in renewing the utility vehicle distributorship agreement. Club Car contends that interest in a new agreement originated on the part of CCQ and Murphy, while CCQ contends that Club Car contacted it to express interest in renewing the agreement. In any case, Dave Marmelstein, then a regional manager for Club Car, met with Murphy in the summer of 1998 to discuss the possibility of CCQ becoming a utility vehicle dealer. CCQ contends that an oral agreement concerning a utility distributorship was reached at that meeting, while Club Car's position is that the meeting was only informational in nature and resulted in Marmelstein directing Murphy to formulate

a business plan concerning the proposed dealership. Marmelstein never received the business plan. CCQ did receive utility vehicles from Club Car for sale between 1998 and 2000, but Club Car contends that no distributorship agreement was in place.

The carryall vehicle is distinct from the golf cart in that it is designed for industrial, rather than personal, use. CCQ contracted to sell Club Car's turf utility vehicles. Since early 1999, Club Car has been charging CCQ a Quebec Provincial Sales Tax ("QST") for products shipped by Club Car into the Canadian province of Quebec. Joan Speering, an accountant employed by Club Car, was responsible for handling Canadian tax matters and maintaining the general ledger where CCQ's QST payments were recorded. Speering contacted the province of Quebec concerning the submission of QST payments and was told that she would need a QST identification number before she could remit QST funds. Speering, however, did not send an application for a QST identification number until August or September, 2000.[5] When she did send in an application, she did so incorrectly. The necessary corrections were made to the application and it was submitted on December 12, 2000.

Club Car received its identification number five months later, on May 11, 2001. Speering then issued a check for the tax due, and the province of Quebec negotiated the check on July 9, 2001.

In 2000, Club Car terminated its relationship with CCQ and awarded the distributorship for the Quebec province to EPC. Club Car sold used golf carts to EPC

in the late 1990s and packaged the used carts with new parts as an incentive for EPC to purchase the carts. EPC refurbished the used carts with the new parts and sold the used carts in Quebec, the same geographic market in which CCQ was the exclusive distributor of new Club Car carts.

Club Car filed the instant action in the superior court of Columbia County, Georgia, on August 29, 2000, seeking to recover more than $1.5 million for goods delivered to CCQ for which Club Car was never paid. CCQ and Murphy removed the case to this Court and filed a motion for dismissal, which the Court denied. CCQ and Murphy then filed three lengthy counterclaims against Club Car and three new Counterclaim Defendants -- Champigny, EPC, and Ingersoll Rand Company, Ltd. ("IRCL") alleging breach of contract, wrongful termination of contract, tortious interference with business relations, tortious interference with the prospective sale of business, conspiracy, conversion, breach of fiduciary duty, violations of federal and state RICO laws, and fraud.

On January 17, 2003, the Court issued an Order on five motions for summary judgment in which the Court dismissed CCQ' s federal and state RICO claims, common law fraud claims, and claims against IRCL. In addition to ruling that CCQ's claims under federal and state RICO claims fail as a matter of law, the Court found its exercise of personal jurisdiction over Murphy to be proper, and, in denying CCQ's motion for summary judgment, the Court found that the used cart agreement between CCQ and Club Car was unenforceable because of its indefinite duration and non-compliance with the statute of frauds.

In the pre-trial status conference, CCQ narrowed its counterclaims voluntarily, limiting its charges to be considered at trial to claims of breach of contract, conspiracy, tortious interference with a business relationship, tortious interference with a contract, promissory estoppel, and breach of fiduciary duty. CCQ' s contentions at trial were that Club Car breached its distributorship agreement with CCQ by providing used carts and new parts to EPC, that EPC and Club Car conspired to interfere with the distributorship agreement, that Champigny and EPC tortiously interfered with CCQ's business relationship and contract with Club Car, that CCQ relied to its detriment on representations made by Club Car concerning the future of its contractual relationship with CCQ, and that Club Car violated its fiduciary duty to CCQ in its handling of the QST funds.

Trial in this case was held before a jury from February 10, 2003, until. February 14, 2003. On the evening of February 14, the jury returned a general verdict in which it awarded $1,557,360 (Can.) to Club Car in its claim against CCQ and $100,000 (Can.) to CCQ in its counterclaim against Club Car.

On March 26, 2003, the Court entered an order granting Club Car's motion for judgment as a matter of law and awarding Club Car attorney's fees under the distributorship agreement and Martin's personal guaranty.

DISCUSSION

I. RULE 50 AND RULE 59 STANDARDS

Under Rule 50(b) of the Federal Rules of Civil

Procedure, a movant may renew a motion for judgment as a matter of law made at the close of evidence and prior to a jury verdict by filing a motion within ten days of entry of judgment. When evaluating a motion for judgment as a matter of law, a court must consider all of the evidence and reasonable inferences arising therefrom in the light most favorable to the nonmoving party. E.g., Carter v. DecisionOne Corp. Through C.T. Corp. System, 122 F. 3d 997(11th Cir. 1997).

In considering whether to grant a judgment as a matter of law, courts

consider whether such sufficient conflicts exist in the evidence to necessitate submitting the matter to the jury or whether the evidence is so weighted in favor of one side that one party must prevail as a matter of law. Although [courts] look at the evidence in the light most favorable to the non-moving party, the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions.

Thosteson v. U.S., 304 F.3d 1312, 1316-17 (11th Cir. 2002); Brochu v. City of Riviera Beach, 304 F.3d 1144, 1154-55 (11th Cir. 2002).

(It is the jury's task - not ours - to weigh conflicting evidence and inferences, and determine the credibility of witnesses. If reasonable jurors could reach different results, we must not second--guess the jury or substitute our judgment for its judgment.);

Silvera v. Orange Count Sch. Bd. , 244 F. 3d 1253, 1257-

58 (11th Cir. 2001).

Rule 50(b) allows a renewed motion for judgment as a matter of law to be filed jointly with a motion for new trial under Rule 59(a) of the Federal Rules of Civil Procedure.

Fed. R. Civ. P. 50(b). Under Rule 59(a),
[a] new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . .

To grant a new trial motion, the Court must find "the verdict [to be] contrary to the great weight of the evidence." Hicks v. Talbott Recovery. Sys., Inc., 196 F.3d 1226, 1242 (11th Cir. 1999). However, the Court is not allowed to substitute its credibility decisions for that of the jury, for "[t]he right to trial by jury would be substantially impaired if a jury's verdict could be set aside because it is based on evidence that the trial judge weighed differently." Hewitt v. B.F. Goodrich Co., 732 F.2d 1554, 1558-59 (11th Cir. 1984). Thus, the Court's discretion to grant a Rule 59(a) motion is exceedingly narrow. Id. at 1559.

Murphy and CCQ have filed motions for judgment as a matter of law under Rule 50 and for a new trial under Rule 59. The Court will consider each Defendant's motions separately.

II. MARTIN MURPHY

As grounds for relief in his Rule 50 and Rule 59

motions, Murphy asserts that the Court did not hold a jury charge conference, that the Court violated the Rule 51 requirement that jury instructions be distributed to counsel prior to closing argument, that the jury charge concerning Murphy's personal guaranty was misleading, that the merger clause in the 1992 distributorship agreement between Club Car and CCQ terminated the personal guaranty, that the personal guaranty was not enforceable because it was of indefinite duration, that the Court improperly allowed the presentation of evidence concerning Murphy's finances at trial, that the Court lacked personal jurisdiction over Murphy, that the scheduling order for the case inconvenienced and prejudiced Murphy, and that Murphy was medically unfit to stand trial. The Court will consider each issue in turn.

A. Charge Conference

Murphy first asserts that "[t]he Court did not hold a charge conference, but presented its charges, formulated without review or argument by the parties, and concluded the charge conference before CCQ had even read the charges." The record, however, indicates that the Court did hold a charge conference on the morning of February 14, 2003, prior to issuing the charges to the jury. Trial Tr., vol. V, at 4-17. At the conference, the Court heard objections from Murphy's counsel. Id. Furthermore, Murphy's counsel had the opportunity to express his exceptions to the jury charges at the close of instructions and before the jury retired to deliberate. Trial Tr., vol. V, at 53-56. Murphy cites no procedural rule or caselaw requiring a charge conference of a particular length, and the Court is aware of no such requirement in Rule 51 or elsewhere.

More importantly, Murphy's counsel offered no objection to proceeding with jury instructions after the conclusion of the charge conference.

"Necessarily, the trial judge has a certain degree of latitude in determining how, and at what point in time, to conduct a charge conference." United States v. Pelullo, 964 F . 2d 193, 200 (3d Cir. 1992) . So long as counsel is given the opportunity to make objections, the Court retains the prerogative to elicit those objections at any time before the jury retires to deliberate. See id. ("While the rule does not specify whether objections should be made before or after the court instructs the jury, inherent in the rule is the requirement that, at either time, some opportunity be afforded."). Rule 51 merely requires the " [o]pportunity . . .be given to make the objection out of the hearing of the jury." The record indicates that Murphy's counsel was allowed the opportunity to object, both at the charge conference and after the instructions had been delivered to the jury. Murphy's counsel had adequate time to review the charges and form its objections before the jury retired to deliberate. Thus, because the Court finds that Murphy was given sufficient opportunity to object to the Court's jury instructions, Murphy may not obtain relief on this ground.

B. Timing of Closing Arguments

Murphy next points out that his counsel "was not advised of the [jury] charges prior to closing argument as required by Fed. R. Civ. P. 51." Doc. 434 at 2. Under Rule 51,

[alt the close of evidence or at such earlier time during

the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

Fed. R. Civ. P. 51. While Murphy's counsel is correct in stating that it was not given a written copy of the jury charges before closing arguments, a new trial is an inappropriate remedy in a case such as this where Murphy did not object at the time of closing arguments and he was not prejudiced by the timing of the arguments.

"If a district judge fails to articulate the instructions to counsel prior to closing arguments, counsel must attempt to persuade the district judge to reveal the planned instructions or counsel will lose the opportunity to show prejudice." Siddicli v. Leak, 880 F.2d 904, 910 (7th Cir. 1989). Indeed, with respect to any procedural error, '[a] litigant may not, speculating on a verdict without making objection, keep silent while matters are transpiring in the trial court . . . . " Ford v. United Gas Corp., 254 F . 2d 817, 818 (5th Cir. 1958). "It is the duty of counsel by objection to call such threatened or actual departure to the judge's attention, and invoke his corrective action, and, if overruled, to make it appear that prejudice has resulted." Id. Accordingly, ""[f]ailure to adhere to Rule 51 . . . does not require a new trial when a party fails to object to the sequence or fails to show prejudice." Matherne v. Wilson, 851 F. 2d 752, 762 (5th Cir. 1988); accord Kestenbaum v. Falstaff Brewing Corp., 575 F. 2d 564, 574 (5th Cir. 1978); Luther v. Maple, 250 F. 2d 916, 920 (8th Cir. 1958); Western Machinery Co. v.

Consolidated Uranium Mines Inc., 247 F.2d 685, 689 (10th Cir. 1957) ; Gwinett v. Albatross S. S. Co.,243 F.2d 8, 9 (2d Cir. 1957).

Not only did Murphy's counsel fail to object when the Court proceeded with closing arguments before issuing jury instructions, Murphy also cannot show prejudice resulting from any non-compliance with Rule 51. Prejudice may be established with a showing that the Court's error "hinder [ed] [counsel] in their ability to present summations which fully dealt with the issues to be placed before the jury." Wiedersum Assocs. v. National Homes Constr. Corp. , 540 F. 2d 62, 666 (2d Cir. 1976); see United States v. Eisen, 974 F.2d 246, 256 (2d Cir. 1992) ("If the rule is violated, reversal is required where the defendant can show that he was 'substantially misled in formulating his arguments' or otherwise prejudiced." (quoting United States v. Smith, 629 F.2d 650, 653 (10th Cir. 1980))).

The Court, however, is not required by Rule 51 to inform counsel of its precise jury instructions in advance of closing arguments or to provide counsel with an advance copy of the instructions. Jones v. Southern Pac. Railroad, 962 F.2d 447 (5th Cir. 1992) ; Emerick v. U.S. Suzuki Motor Corp., 750 F.2d 19, 22-23 (3d Cir. 1984) ; Beimert v. Burlington Northern Inc., 726 F. 2d 412, 414 (8th Cir. 1984) ; see Siddigi, 880 F.2d at 910 ("If counsel had adequate notice of the substance of the instructions to be given, a failure to precisely comply withRule 51 would be harmless and we will not order a new trial under those circumstances without a showing of material prejudice."). The Court may provide counsel with the substance, though not the particular wording, of the instructions, "so that they can

make effective closing arguments and tender any objection." Jones, 962 F.2d at 450; see Williams v. Independent News Co., 485 F. 2d 1099, 1106 (3rd Cir. 1973) (finding no prejudice where counsel "was forewarned prior to his closing jury speech as to the critical instructions which were ultimately delivered by the court").

Murphy contends that he was unaware of how the Court would charge the jury on matters of Quebec law prior to his closing argument. The Court, however, issued two written orders in the course of the trial clarifying which law would apply to which claims in the case. In a February 11, 2003, order addressing CCQ' s and Murphy's motion "for determination of foreign law," the Court clarified its pretrial ruling that "the locus of CCQ' s alleged injuries was the Canadian Province of Quebec, and that Quebec law accordingly should apply to CCQ's tort claims against EPC and Pierre Champigny." Doc. 403 at 2.

In a second order issued on February 11, the Court further clarified the law applicable to the claims in the case:

[T] he tort claims levied by CCQ against EPC are to be determined according to the law of Quebec. Georgia law will be applied to all other claims in this case, including the contract claim of Club Car in the original complaint, the breach of contract claim filed by CCQ against Club Car, the promissory estoppel claim filed by CCQ against Club Car, the claim related to Quebec Sales Tax filed by CCQ against Club Car, and the conspiracy claims filed by CCQ against Club Car and EPC.

Doc. 404 at 3. The Court proceeded to charge the jury accordingly, with Quebec law applying to the tort claims brought by CCQ against EPC and Champigny and Georgia law applying to all other claims in the case. Jury Inst. at 12-28.

The Court clarified the law of this case in the pretrial conference where it ruled that Quebec law would apply to CCQ' s claims in tort against EPC and Champigny, Docs. 375, 402, and in two separate orders issued on the second day of trial. Counsel had two full days after the Court clarified the law of the case before closing arguments proceeded. Counsel for Murphy was aware of the substance of the jury instructions prior to closing argument and, in fact, had taken the opportunity to object to the Court's rulings on the substance of the jury instructions. Doc. 392. Thus, according to prevailing caselaw, the Court complied with the requirements of Rule 51 by alerting counsel to the substance of the jury instructions before closing argument.

Murphy, nevertheless, claims that a dispute had arisen between his counsel and EPC's counsel concerning the precise language of applicable Quebec law. Both EPC and Murphy presented amended requests to charge the jury after the Court ruled on the law that would be applied to the issues of the case. Docs. 380, 387, 399, 408. The amended requests to charge were filed in order to inform the Court on Quebec law and its applicability to the issues of the case.

The Court notes initially that neither party filed jury instructions regarding Quebec law that marked a significant departure from the common law applied to

tort claims in the State of Georgia. Using the proposed jury instructions submitted as a guide, the Court cannot conceive of a different outcome on the liability side of Murphy's claims against EPC and Champigny whether Georgia or Quebec law had been applied Com are Doc. 380, EPC Revised Requests to Charge 6-16 (applying Quebec law to tort claims) with Doc. 353, EPC Requests to Charge 6-12 (applying Georgia law to tort claims). Murphy's revised jury requests, in fact, were nearly identical to their prior requests under Georgia law on tort issues.[7]

Because their revised requests appeared less argumentative than those presented by EPC and Champigny, the Court patterned its jury instructions on tort claims primarily from Murphy's and CCQ's requests. For example, in his request to charge on the issue of tortious interference with a business relationship, Murphy provided that

[t]o prove a claim for tortious interference with business relations, Club Car Quebec must prove that Pierre Champi gny (1) acted improperly and without privilege, (2) acted purposely and with malice with the intent to injure, (3) induced Club Car not to enter into or continue a business relationship with the plaintiff, and (4) caused plaintiff financial injury.

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in his duty, he is responsible for any injury he causes to another

person by such fault and is liable to reparation for the injury, whether it be bodily, moral, or material in nature.

Tortious interference with business relations i s a distinct and separate tort from that of tortious interference with contractual relations so proof of a valid and enforceable contract is not required as an element of a cause of action for tortious interference with business relations. You may find that Pierre Champigny interfered with Club Car Quebec's business relations even if you do not find that the distributor agreement was a contract.

Malice is a term to be given a liberal meaning; malicious or maliciously means an unauthorized interference, or any interference without legal, justification or excuse. Personal ill will or animosity is not essential to establish malice.

A cause of action for tortious interference with business relations encompasses interference with future business relationships as well as existing ones, and liability may result not only from disruption of the relationship but also from elimination of the injured party's ability to perform.

To establish a cause of action for interference with future business relations a party must demonstrate that absent the alleged interference, those relations were reasonably likely to develop or continue.

A person's business is property, and a person is entitled to have such property protected from tortious interference by a third person who, in interfering, is not

acting in exercise of some right.

Doc. 355, Request 5. The emphasized portions of Murphy's requested charges represent language used either verbatim or in substance in the Court's jury instructions.

The Court's instructions to the jury on the issue of tortious interference with business relations were as follows:

To recover for tortious interference with business relations, CCQ must establish each of the following elements by a preponderance of the evidence

1. Some improper action or wrongful conduct by EPC or Champi gny without privilege;

2. That EPC or Champigny acted purposefully and with malice with the intent to injure CCQ's business;

3. That EPC or Champigny induced a party or a third party not to continue a business relationship with CCQ; and

4. That EPC's or Champigny's tortious conduct proximately caused financial injury to CCQ.

For purposes of these types of torts, "improper actions" constitute conduct wrongful in itself. Thus, improper conduct means wrongful action that generally involves predatory tactics, such as physical violence, fraud or misrepresentation, defamation, use of confidential information, and unwarranted criminal prosecutions. "Privilege" means legitimate economic interests of

EPC. "Malice" means the intent to injure CCQ's business.

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

It is not unlawful, however, for a company to compete against another company. The exercise of an absolute legal right is not and cannot be considered an interference with a business relationship. The mere fact that one's activity has caused economic impact to another business does not mean that the other business may recover. A business is obliged to suffer losses resulting from lawful competition.

The theory of the tort of interference with business relations is that the law draws a line between lawful competition and vindictive destruction of someone else's business. A systematic effort to induce Club Car to end its business relationship with CCQ and to use EPC as a distributor instead is unlawful when the purpose of such inducement is to cripple or destroy CCQ rather than to further a legitimate business relationship with Club Car.

A cause of action for tortious interference with business relations encompasses interference with future business relationships, as well as existing ones, and liability may result not only from disruption of the relationship but also from elimination of the injured party's ability to perform. CCQ must demonstrate that absent any interference by EPC or Champigny, the business relations that were allegedly lost to CCQ were

reasonably likely to continue. Tn other words, in order to find for CCQ on this claim, you must find that Club Car's business relationship with CCQ was reasonably likely to continue but for the interference of EPC or Champi gny.

Tortious interference with business relations is a distinct and separate tort from that of tortious interference with contractual relations, so proof of a valid and enforceable contract is not required as an element of a cause of action for tortious interference with business relations. You may find that Champigny or EPC interfered with CCQ's business relations even if you do not find that the Distributor Agreement was valid or breached.

Jury Inst. at 15-18. The emphasized portions of the jury instructions are taken either in substance or verbatim from Murphy's requested charges.

In his request to charge on his other tort claim, tortious interference with a contract, Murphy submitted the following charge request:

In Count 6, Club Car Quebec further alleges that EPC tortiously interfered with Club Car Quebec's contractual relationships in assisting Club Car in breaching the distributorship agreement by receiving from Club Car, and then selling, new parts and refurbished one year old carts. EPC denies that it assisted Club Car in breaching the agreement.

You must decide whether Pierre Champigny torti ously interfered with Club Car Quebec's contractual relations related to the distributorship.

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in his duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral, or material in nature.[8]

Tortious interference with contractual relations requires a contractual relationship. To prevail, Club Car Quebec must establish that EPC engaged in improper action or wrongful conduct without privilege, acted purposely and with malice with intent to injure, and induced a breach of contractual obligations or made a contract more difficult to perform, and damages.Intentional and non-privileged interference by a third party with a contractual right or relationship need not result in a breach of the contract to be actionable; it is sufficient if the invasion retards performance of the duties under the contract or makes performance more difficult or expensive.

A party contractually bound to render performance has a property interest in the contract in that he has the right to render the required performance free from unjustified and unprivileged intentional invasions that retard performance or make it more difficult or expensive; such interference constitutes an actionable tort.

Interference with contractual rights, such as inducing one to breach his contract with another, is an actionable

tort.

Doc. 355, Request 6. The emphasized portions of Murphy's requested charge were included either in substance or verbatim in the Court's jury charges.

The Court issued the following instructions to the jury on the issue of tortious interference with an existing contract:

CCQ further alleges that EPC tortiously interfered with CCQ's contractual relationships in assisting Club Car in breaching the Distributor Agreement by receiving from Club Car, and then selling, new parts and refurbished used cars. EPC denies that i t assisted Club Car in breaching the Agreement. You must decide whether Champigny tortiously interfered with CCQ's contractual relations pertaining to the distributorship.

Tortious interference with contractual relations requires a contractual relationship. To prevail, CCQ must establish that EPC engaged in improper action or wrongful conduct without privilege, acted purposely and with malice and intent to injure, and induced a breach of contractual obligations or made a contract more difficult to perform, and damages.

Intentional and non-privileged interference by a third party with a contractual right or relationship need not result in a breach of the contract to be actionable; i t is sufficient if the invasion retards performance of the duties under the contract or makes performance more difficult or expensive.

A party contractually bound to render performance has

a property interest in the contract in that he has the right to render the required performance free from unjustified and unprivileged intentional invasions that retard performance or make it more difficult or expensive. Such interference constitutes an actionable tort.

Jury Instr. at 18-19. The entirety of the jury instruction on this issue was adopted verbatim from Murphy's requested charges.

Comparison of Murphy's requests to charge and the instructions submitted by the Court to the jury indicate that Murphy's requested charges were included substantially in the Court's instructions. In such circumstances, Murphy cannot complain of prejudice resulting from the timing of the submission to counsel of the complete jury instructions. See Beard v. Mitchell, 604 F.2d 485, 493 n.8 (7th Cir. 1979) (finding no error where plaintiff claimed that judge improperly advised him of instructions, where "most of plaintiff's instructions were given in substance").

Murphy cannot claim to have been surprised by the Court's instructions to the jury on the Quebec law issues. The Court apprized counsel for each party on what the substance of the charges would be during the trial, and the Court substantially used Murphy's requested charges in its instructions to the jury. See Siddigi, 880 F.2d at 910 (finding no prejudice where, though the judge "did not clearly state what instructions he would give, counsel for both parties were apprised of his thoughts on what issues would be presented to the jury").

To summarize, the Court made counsel for each party aware of the applicable law of this case, and thus of the substance of its jury instructions, in orders issued during the trial and prior to closing arguments. Under prevailing law, the Court is required only to alert counsel to the substance of the charges, not to provide a written, finished copy of the charges prior to closing arguments. Even if the Court did violate Rule 51 in failing to apprize counsel of the jury instructions prior to closing arguments, Murphy cannot make the requisite showing that his counsel objected to proceeding with closing arguments. Furthermore, Murphy cannot show prejudice resulting from any violation of Rule 51. The similarity between Quebec and Georgia tort law, and the near identity of the Court's jury instructions and Murphy's proposed charges, render harmless any Rule 51 error. Murphy may not obtain relief on this ground.

C. Personal Guaranty Charge

Murphy next challenges the Court's charge with regard to his personal guaranty. According to Murphy, the Court should have charged that the jury is to determine whether the personal guaranty remained in effect since 1991, not whether it was properly executed and enforceable in 1991.

The Court's instructions with regard to the personal guaranty and its enforceability were as follows:

Club Car contends that Martin Murphy has individually guaranteed CCQ's debts to Club Car as specified in his personal guaranty. A contract of guaranty is one whereby a person-in this case, Martin Murphy-

obligates himself to perform the obligation of another-in this case, CCQ-in consideration of a benefit flowing to the guarantor or other benefits given to his principal. A guarantor is jointly and severally liable with his principal unless the contract provides otherwise.

To recover damages against Martin Murphy based on his personal guaranty, Club Car must prove that:

1. Martin Murphy executed the guaranty agreement; and

2. CCQ failed to pay the amount demanded by Club Car.

If you should then find that CCQ is indebted to Club Car such that Club Car is entitled to recover damages from CCQ, then Martin Murphy and CCQ would be jointly and severally liable to Club Car.

Jury Instr. at 11. The instructions given are a reflection of Georgia law expressed in Rodgers v. First Union Nat. Bank of Ga., 220 Ga. App. 821, 821, 470 S.E.2d 246, 247 (1996).

While the Court did not instruct the jury on whether the personal guaranty remained in effect after 1991, Murphy also did not request such a jury charge.[9]" [E]ach party is responsible for requesting whatever jury instructions it may deem appropriate, and failure to so request, or to object to an instruction deemed inappropriate, precludes assigning as error the giving or the failure to give an instruction." McElroy v. Firestone Tire & Rubber Co., 894 F.2d 1504, 1510 n.10 (11th Cir. 1990) ; Ad-Vantage Tel. Directory

Consultants v. GTE Directories Corp., 849 F.2d 1336, 1349 (11th Cir. 1987) ("[A] litigant is entitled to have the jury instructed on its theory of the case, if there is any competent evidence to support the theory, and if the instruction is properly requested."); 9 Moore' s Federal Practice § 51.11 [l] [a] .

Whether or not Murphy asserted the issue of the continued enforceability of the guaranty at trial, he made no request that the jury be charged on the theory that the guaranty was not enforceable after 1991. Under the rule in the Eleventh Circuit, he cannot now obtain a new trial on the Court's failure to issue a jury charge that he did not request. Accordingly, Murphy's motions must fail on this ground.

D. Validity of the Personal Guaranty

Murphy next contends that a merger clause in a 1992 distributorship agreement executed by CCQ and Club Car forecloses the enforceability of the personal guaranty he executed in 1991. Murphy further contends that he understood the personal guaranty to be enforceable for only one year. Murphy' s latter contention is contradicted by the language of the guaranty itself, which provides that "this Guaranty is made and shall continue as to the Obligations incurred or arising prior to actual receipt by Club Car, Inc. of written notice of the termination hereof from the Guarantor." Ex. 4. Murphy's contention that he believed the guaranty would expire after one year is, at best, parol evidence contradicted by the unambiguous terms of the guaranty.

"Where contract language is unambiguous, no

construction is necessary and the Court must simply enforce the contract according to its clear terms." Caswell v. Anderson, 241 Ga. App. 703, 703, 527 S.E.2d 582, 582 (2000). Parol evidence cannot serve to change the unambiguous terms of a contract. O.C.G.A. § 13-2-2(l). The language in Murphy's personal guaranty addressing the continued enforceability of the guaranty until written notice of termination by Murphy is unambiguous, and Murphy's contentions regarding his understanding of the guaranty are foreclosed by the parole evidence rule.

Likewise, Murphy's contention that a merger clause in the 1992 distributorship agreement between CCQ and Club Car invalidated the guaranty, which was executed in 1991, lacks merit. Murphy was not a party to, nor was he bound by, the distributorship agreement in his personal capacity, and the enforceability of the guaranty cannot be affected by a separate contract to which Murphy was not a party. Accordingly, Murphy may not obtain relief on these grounds.

E. Duration of the Personal Guaranty

Murphy also contends that the guaranty is unenforceable because it was indefinite in duration. The guaranty, by its own terms, runs "as to the Obligations incurred or arising prior to actual receipt by Club Car, Inc. of written notice of the termination hereof from the Guarantor." According to this language, the guaranty is not of indefinite duration but runs until written notice of termination from Murphy. Georgia courts have found similar personal guaranties with similar durational limitations to be enforceable. Builders Dev. Corp. v. Hughes Supply, Inc. , 242 Ga. App. 244, 245,

529 S.E.2d 388, 389 (2000); Schroeder v. Hunter Douglas, Inc., 172 Ga. App. 897, 898, 324 S.E.2d 746, 748 (1984); Blalock v. Central Bank of Geor. 170 Ga. App. 140, 140, 316 S.E. 2d 474, 475 (1984) . Accordingly, the Court finds the jury determination that the personal guaranty is enforceable to be supported by legal authority. [10]

F. Evidence, of Murphy's Finances

Murphy next argues that the Court's determination that Club Car could present evidence regarding Murphy's personal financial activity was in error and unduly prejudicial. Murphy's counsel, however, did not object at trial when the evidence regarding his financial activity was elicited. Trial Tr., vol. I, at 111-17. The Court further finds evidence of transfers by Murphy of money from CCQ into a separate corporation to be relevant to Murphy's motive and intent in his relationship with Club Car under the distributorship agreements. The evidence also could show that Murphy intentionally has avoided his obligations under the distributorship agreement, which would entitle Club Car to recover expenses of litigation under O.C.G.A. § 13-6-11. Because Murphy's counsel did not object to the evidence at trial, and because the evidence was relevant to claims pursued by Club Car, Murphy may not obtain relief on this ground.

G. Personal Jurisdiction

Murphy next challenges the Court's exercise of personal jurisdiction in this case. While Murphy has done business in Georgia in his capacity as a corporate officer of CCQ, he contends that he does not have

sufficient personal contacts with the state to warrant personal jurisdiction. Murphy has raised this issue previously, and the Court has addressed his contentions in four prior orders. For the sake of clarity, however, the Court will address again its bases for exercise of personal jurisdiction.

Georgia courts recognize a sharp distinction between the personal actions of a corporate officer and actions undertaken in their official capacity for purposes of determining whether a court may assert personal jurisdiction over that officer." As the court in Girard v. Weiss, 160 Ga. App. 295, 297-98, 287 S . E . 2d 301, 303 (1981), noted, an individual who does not have sufficient minimum contacts with Georgia under International Shoe v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 2d 95 (1945), and progeny is not subject to personal jurisdiction in Georgia for actions taken within the state solely in his or her capacity as a corporate officer. Further, in Harbin Enterprises Inc. v. Sysco Corporation,195 Ga. App. 694, 696, 395 S.E.2d 618, 620 (1990), the Georgia Court of Appeals specifically refused to hold that a corporate officer waived personal jurisdiction by signing a contract with a forum selection clause when he signed the contract in his capacity as an officer for the corporation.

The presence of a personal guaranty does not change that outcome. Southern Electronics Distributors, Inc., v. Anderson, 232 Ga. App. 648, 650. 502 S.E.2d 257, 260 (1998); see also, Apparel Resources International, Ltd. v. Amersig Southeast, Inc., 215 Ga. App. 483, 451 S.E.2d 113 (1994) (refusing to exercise personal jurisdiction over nonresident defendant whose only contacts with Georgia were her business dealings as

corporate officer and personal guaranty she signed) . Thus, in Georgia, the rule is that in order to assert personal jurisdiction over an individual whose dealings in the state have primarily been in his capacity as a corporate officer, the individual must have independent minimum contacts with the forum state that meet the due process standards established by International Shoe. But see Stephens v. Entre Computer Centers, Inc., 696 F. Supp. 636, 639 (N.D. Ga. 1988) (holding that forum selection clause is sufficient to establish personal jurisdiction over corporate officer).

In its prior order addressing Defendants' motion to dismiss, the Court found that Murphy possessed sufficient, independent minimum contacts with the State of Georgia in order to establish personal jurisdiction. Murphy perpetuated a business relationship with Club Car, which maintained its principal place of business and its manufacturing plant in Georgia, that lasted more than twenty years. Murphy negotiated contracts and agreements in Georgia, purchased products in Georgia, and maintained a distributorship relationship necessitating constant shipments from Georgia to Canada.

The Court finds this case analogous to White House, Inc., v. Winkler, 202 Ga. App. 603, 415 S.E.2d 185 (1992). In White House, the defendant, a California resident, was sued in his individual capacity for breach of an agreement to guaranty his incorporated business's debt. The defendant, as the principal officer of his corporation, contracted with the plaintiff to buy a large number of t--shirts and to execute a personal guaranty for payment. He failed to execute the guaranty and his corporation did not pay for the t-shirts. The Georgia

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Court of Appeals found that the trial court properly could exercise jurisdiction over the defendant even though he had never visited Georgia. Id. at 605. The court noted that the defendant, in the name of his bankrupt corporation, had done business with the Georgia plaintiff for several years, that the two businesses had an ongoing relationship, that his actions were purposeful, and that the defendant created continuing personal obligations between himself and the plaintiff. Id. The Court of Appeals concluded "that [the defendant] was far from being a passive party . . . but instead knowingly and 'purposefully did an act or acts and consummated a transaction or transactions within the state, so as to establish legally sufficient contacts.'" Id. (citing Georgia R. Bank Co. v. Barton, 169 Ga. App 821, 824, 315 S.E.2d 17 (1984)); see also Drennen v. First Home Savings Bank, 204 Ga. App. 714, 420 S.E.2d 376 (1992) (holding that Alabama defendant who made personal guaranty to secure loans for business deal was subject to personal jurisdiction in Georgia because he purposefully conducted business in Georgia); Autrey v. UAP AG/CHEM, Inc., 230 Ga. App. 767, 497 S.E.2d 402 (1998) (holding that Florida defendant, who was president and shareholder of corporation and who executed personal guaranty for delinquent debts of corporation, was subject to personal jurisdiction in Georgia).

Likewise, Murphy here acted in a purposeful fashion, created continuing personal obligations between himself and Club Car on behalf of CCQ, and was far from being a passive party in CCQ's business dealings with Club Car. Thus, the Court again finds that Martin Murphy is subject to personal jurisdiction under the Georgia long-arm statute and the Due Process Clause

of the United States Constitution.

H. Trial Schedule

Murphy next contends that the Court committed abuse of discretion in barring discovery and preservation of trial testimony, as well as scheduling the trial and all hearings to create the maximum inconvenience and prejudice to Martin Murphy. This includes but is not limited to scheduling trial before Martin Murphy . . . was medically cleared to stand trial.

Doc. 434 at 5.

The Court initially scheduled trial in this case for November 2002. On motion by Murphy, the Court continued the trial because of Murphy's health problems, which included complications from a stroke suffered in May 2002. Murphy underwent surgery on November 23, 2002. In a letter to the Court on October 29, 2002, Dr. Theodore Wein, Murphy's treating physician, indicated that "[a] normal recovery period from surgery of this magnitude would be three months before resuming normal activity. Therefore, I would advise that the trial be postponed at least until February, as originally requested." Doc. 434, Ex. 3. The Court continued the trial until February 10, 2003, slightly less than three months after Murphy's surgery and within the February time frame suggested by Dr. Wein.

While Murphy's counsel did request that the Court continue the trial until March 2003 in two letters to the Court written in January, in neither letter did Murphy's counsel inform the Court that Murphy's health status would preclude him from appearing at a

February 2003 trial date. In a January 2, 2003, letter, in fact, Murphy's counsel informed the Court that "[t]he early indications are that Mr. Murphy tolerated the surgery well and is doing much better. Mr. Murphy states that he is feeling better." Doc. 435. In a January 20, 2003, letter in which Murphy's counsel urged the Court to delay the start of trial until after March 26, 2003, because of prior commitments and vacations of counsel, Murphy's counsel added that "we have not heard from Mr. Murphy's doctors regarding his current health status." Id. Murphy made no formal objection to the February 10, 2003, trial date, either during the trial, the pre-trial conference, or at any time before the jury verdict. Murphy's counsel did request that the Court inform the jury of Murphy's medical problems i f an explanation of his condition was warranted during his testimony. Murphy testified competently during the trial, and the Court did inform the jury of his past medical problems.[12] The Court granted recess during Murphy's testimony so that he could regain his composure when he appeared to become emotional.[13]

Murphy's failure to object to the timing of the trial in this case ultimately defeats his motion for new trial on this ground. Even if an objection had been made, though, Murphy has failed to present evidence, either in the form of opinions from doctors or Murphy's trial testimony, that he was not medically competent to stand trial. Accordingly, his motions lack merit on this ground.

III. CCQ

CCQ also has filed motions for a new trial and for

judgment as a matter of law. As grounds for relief, CCQ asserts that Club Car owes CCQ Quebec Sales Tax ("QST") funds as a matter of law, that the jury was not properly instructed on Quebec law with regard to CCQ's claims against Champigny and EPC, that the Court erroneously excluded expert testimony regarding damages, that CCQ was not informed of the Court's charges prior to its closing argument, that CCQ should have been allowed to amend its pleadings after the Court declared Quebec law applicable in this case, that counsel for EPC and Champigny engaged in ex parte communications with the Court, that the Court made other enumerated errors in instructing the jury, that the Court failed to act on a motion to amend deposition designations, that Club Car was not entitled to attorney's fees and costs, that the Court erred in allowing Club Car to present evidence of Murphy's finances, that the Court erred in granting summary judgment to Club Car on CCQ's claims of fraud and RICO violations, that the Court "struck CCQ's claim for breach of the used car agreement and decided other issues that were not fully argued by the parties or properly before the Court for decision" in its summary judgment order, that Ingersoll-Rand Company Limited ("IRCL") was improperly dismissed from this case, that CCQ was prejudiced by the Court's scheduling order, and that the Court wrongfully denied CCQ the opportunity to take trial depositions of Russ Hooper and Lynda Capaddocia. The Court will address each contention in turn.

A. QST

CCQ seeks judgment as a matter of law on its claim for damages associated with QST funds allegedly owed by

Club Car. According to CCQ,

> [t]he jury verdict also, in part, awarded Club Car damages for its claims, including for QST which Club Car was not and is not authorized to collect on purchases in 2000, and which issue was intentionally misrepresented to the jury by Club Car counsel at trial." Doc. 435 at 2. CCQ asserts that Anita Murphy "was not allowed to say that Club Car was not authorized to collect the QST it collected from CCQ from 1998-2000, despite her personal knowledge." Doc. 436 at 4.

CCQ sought judgment as a matter of law at trial on the matter of Club Car's claim for attorney's fees and expenses. Trial Tr., vol II, at 313. No other issues were raised by CCQ in a Rule 5 0 motion before the jury was charged and retired to deliberate. According to Rule 50, a party may not seek judgment as a matter of law on an issue that was not raised in a Rule 50(a) motion at trial. Fed. R. Civ. P. 50(b); Redd v. Phenix City, 934 F.2d 1211, 1214 (11th Cir. 1991). While CCQ may seek relief in a Rule 59 motion for new trial on the QST issue and any other issue not raised during trial in its Rule 50(a) motion, it may not obtain relief under Rule 50(b).

The Court does not find testimony or other evidence in the record to support CCQ's contention that Club Car was not due the full amount of the jury verdict upon a finding that CCQ had breached the distributorship agreement. Regarding Anita Murphy's testimony concerning the QST funds, her knowledge of Club Car's authority to collect QST funds was not based on personal knowledge but on hearsay evidence. At trial she testified that " [i] t was determined that all the invoices that I had claimed from Club Car, Inc. were

not valid because Club Car, Inc. was not registered with the provincial government." Trial Tr., vol. III, at 202.[14] The Court properly excluded her testimony under the hearsay rule. Fed. R. Evid. 802.

Without Anita Murphy's testimony, the Court perceives, and CCQ cites, no evidence or testimony in the record indicating that Club Car was not entitled to recover the full amount of the jury award." Accordingly, CCQ is not entitled to a new trial on this ground.

B. Jury Instructions on Quebec, Law

CCQ next asserts that the jury was not properly instructed on Quebec law. According to CCQ, "[t]hough Quebec law supposedly applied to the claims against Champigny, the jury was given Georgia law instructions on the conspiracy claims against Champigny that were erroneous, precluded liability by Champigny, and prejudiced the jury against CCQ." Doc. 435 at 3.

As the Court has illustrated, however, the instructions issued by the Court to the jury regarding CCQ's tort claims against EPC and Champigny, to which Quebec law applied, were almost identical to the jury charges requested by CCQ. See supra, Section II. B . Thus, if the Court's instructions bore a closer resemblance to Georgia law than Quebec law, EPC and Champigny alone would have reason to complain. In reality, as the Court stated supra, from the requested jury charges submitted by both EPC and CCQ it does not appear that tort liability standards in the Province of Quebec vary significantly from those in Georgia.

To the extent that the Court's jury instructions differ from those submitted by CCQ, a trial judge is allowed "wide discretion over the style and wording employed as long as the [jury] instructions accurately reflect the law." Schafer v. Time, Inc., 142 F.3d 1361, 1368 (11th Cir. 1998). So long as "the jury charges, considered as a whole, sufficiently instructed the jury so that jurors understood the issues and were not misled," a new trial is not warranted. Id.

The charges on Quebec law in this case, however, closely resembled those submitted by CCQ. In such a case, CCQ cannot complain of error. Beard v. Mitchell, 604 F.2d 485, 493 n.8 (7th Cir. 1979) (finding no error where plaintiff claimed that judge improperly advised him of instructions, where "most of plaintiff's instructions were given in substance"). Accordingly, CCQ is not entitled to relief on this ground.

C. Exert Testimony

CCQ asserts that " [t]he Court failed to follow clear and controlling Eleventh Circuit authority when it excluded evidence and testimony offered by CCQ' s damages expert based on issues that go solely to the credibility of the testimony, and which affected only a portion of the excluded testimony." Doc. 435 at 4. CCQ refers apparently to the Court's exclusion of the expert testimony of Peter Ryan.

At trial, the Court allowed Ryan to testify over objections to his qualifications" on the issue of damages incurred by CCQ. Ryan divided CCQ's damages into eight categories representing past and future lose profits and lost sales from 1997 to 2000 and from 2001 to

2005. Trial Tr., vol. IV, at 32. He testified that CCQ had suffered damages in theform of lost profits amounting to $10,464,000 (Can.). Id. At 89. On cross--examination, Ryan conceded that he used gross sales numbers to calculate future damages without accounting for incremental expenses incurred in generating sales, or any expenses other than costs of good sold. Id. at 94. He also conceded that his damage figures had not been discounted to present value and that he had not subtracted revenue generated by CCQ, and revenue that would have been generated by CCQ, irrespective of any deleterious actions taken by EPC, Champigny, or Club Car. Id. at 96-97.

At the close of Ryan's testimony, counsel for EPC and Champigny objected again to the expert testimony on the ground that the testimony failed to meet the strictures of reliability for expert testimony set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The Court, after hearing arguments on the motion outside the presence of the jury, granted the motion to exclude aspects of Ryan's testimony where he calculated lost profit without including expenses. Immediately after the jury returned, and just prior to closing arguments, the Court instructed the jury,

Members of the jury, with respect to Mr. Ryan's testimony as to damages, when he says that he did not take into consideration the expenses involved and merely used the gross amount, his opinion as to the loss on the Defendant's counterclaim is stricken. You are not to consider that.

Trial Tr., vol. IV, at 222.

In calculating lost profits, "the gross amount minus expenses equals the amount of recovery." Shaw v. Rui z , 207 Ga . App. 299, 304, 428 S.E.2d 98, 99 (1993).[17] In seeking lost profits, a party must "show the probable gain with great specificity as well as expenses incurred in realizing such profits." Id. Ryan's final damage figure of $10,464,000 (Can.), and the damage totals combined to reach that figure, were biased by his failure to include incremental costs incurred in generating revenue, as well as his failure to discount the figures to present value.

Under Federal Rule of Evidence 702, a court is required to exclude expert testimony that is unreliable and unhelpful to a jury, as such testimony "by its very nature has the potential to be both powerful and misleading. "K.W. Plastics v. United States Can Co., 131 F. Supp. 2d 1289, 1291 n. l (M.D. Ga. 2001). Under Daubert, the Court is charged with a "gatekeeping" function, under which the Court is required to screen expert testimony before allowing such evidence to be presented to a jury for deliberation, to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert, 509 U.S. at 589 ("Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.").

The objective . . . is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that

characterizes the practice of an expert in the relevant field.

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999). The Court must render an assessment "of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied to the facts in issue." Daubert, 509 U.S. at 592. Daubert's "gatekeeping" requirement is applicable to expert testimony concerning calculation of lost profits. Kumho Tire, 526 U.S. at 147.

In this case, the Court considered Ryan's testimony and concluded that it did not comport with the requirements of Georgia common law for calculation of lost profits, nor did it comply with rudimentary accounting standards. Evidence of gross profits submitted to the jury without the inclusion of incremental expenses, the exclusion of CCQ's profits gained independent of Club Car, Champigny, or EPC, or an adjustment to account for inflation could serve only to confuse the jury unnecessarily. Outside a courtroom, in an accounting office, one would not expect Ryan to calculate profits for, say, CCQ's tax returns in such a manner, reporting only profits from sales without including overhead and expenses. Daubert requires those same professional standards to be applied by an expert testifying as to lost profits in a courtroom. Ryan's testimony failed the standards set forth in Daubert and Kumho Tire.[18]

Accordingly, the Court instructed the jury to ignore any damages calculations that did not include expenses.

The Court, however, did not instruct the jury to ignore all of his testimony. Any testimony elicited from Ryan not concerning lost profits, where expenses were not deducted, was submitted to the jury. 19 Furthermore, testimony from Murphy and his wife, Anita Murphy, concerning CCQ's financial losses was still in the record for the jury to consider. Courts have recognized that, even where the exclusion of evidence related to damages was error, the error is harmless where sufficient evidence exists on the record for the jury to render a verdict. E. ., Iervolino v. Delta Air Lines, Inc., 796 F. 2d 1408, 1420-21 (11th Cir. 1986); C.A. May Marine Su l Co. v. Brunswick Core, 649 F.2d 1049, 1054 n.6 (5th Cir. 1981); Hall v. Texas & New Orleans Ry. Co., 307 F. 2d 875, 877 (5th Cir. 1962) ; Martin v. Handy-Andy Community Stores of Texas, 214 F.2d 10, 12 (5th Cir. 1954). Thus, even if the Court had erred in excluding certain parts of Ryan's testimony, testimony concerning damages remained on the record for the jury to consider and CCQ was not prejudiced by the error to the extent that a new trial would be warranted. 20 See Fed. R. Evid. 103 (a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."); Fed. R. Civ. P. 61 ("No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice.").

CCQ also argues that the Court "failed to follow the procedure laid out in Daubert. There was no hearing on the expert's methodology or opposing expert testimony offered." Doc. 436 at 7. In Kumho Tire, however, the

Court recognized that [t]he trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable.

Kumho Tire, 526 U.S. at 152. The Court's authority and responsibility under Daubert may be exercised "when asked to rule on a motion in limine, on an objection during trial, or on a post-trial motion," provided that the Court has sufficient evidence to evaluate the expert testimony. Goebel v. Denver & Rio Grande Western R. R., 215 F. 3d 1083, 1087 (10th Cir. 2000).

In this case, the Court allowed each party to question Ryan on voir dire concerning his qualifications. Trial Tr., vol. Iv, at 17-21. Ryan then was subject to extensive direct, cross, and re-direct examination, at which time testimony was solicited concerning Ryan's methods of calculating CCQ's past and projected damages. Id. at 21-113. While a Daubert hearing i s not required where the record before the Court i s sufficient for the Court to make a determination, 2 the Court nevertheless heard oral argument outside the presence of the jury after Ryan had delivered his testimony. Id. at 212-222. At that time, the Court heard argument from each party concerning the reliability and accuracy of Ryan's testimony, and whether that testimony would aid the jury in deciding the issues before it.

The Court determined from the evidence before it that Ryan's procedures for calculating CCQ's past and projected future profit margins were insufficient

according to rudimentary accounting standards, and that his testimony regarding such margins would only serve to confuse the jury. The Court did not need the aid of an opposing expert to recognize the deceptive nature of Ryan's methodology and its lack of conformity with generally accepted accounting principles. Indeed, as the Court expressed at trial, it is a matter of "common sense" that a party's profit margin will be affected by such things as incremental costs and that a party's damages should be reduced by revenue it would generate regardless of an opposing party's fault and adjusted for inflation. If Ryan were testifying as an ordinary, non-expert witness, perhaps an instruction to the jury concerning his testimony would be unnecessary. Because of his status as an expert witness, and the weight that such status may carry within the confines of a jury room, the Court determined that an instruction concerning Ryan's testimony was appropriate.

Because Ryan's expert testimony was misleading and departed from traditional norms of calculation of damages, the Court properly excluded aspects of his testimony that departed from those norms. The Court finds no error either in its ruling or in its procedure in arriving at the ruling. CCQ may not obtain relief on this ground.

D. Timing of Charge Conference

CCQ next raises a contention identical to one raised by Murphy, that CCQ's counsel did not have access to a written copy of the jury charges prior to closing arguments. The Court addressed this contention in Section II.B, supra, of this Order. For the reasons

expounded in that Section, the Court finds that CCQ did not object to, and was not otherwise prejudiced by, the Court' s failure to distribute written copies of the jury charges prior to closing arguments.

E. Motion to Amend Pleadings

CCQ contends that because the Court granted EPC's motion to apply Quebec law to CCQ' s tort claims against it, CCQ should be allowed to amend its complaint to add additional claims. CCQ takes the position that the Court "changed" the law applicable to the case in the week prior to trial, and that it should be allowed to supplement its contentions as a result.

CCQ filed three lengthy counterclaim complaints in this case, each filled with a myriad of claims ranging from alleged violations of Racketeer Influenced Corrupt Organizations ("RICO") laws to common law claims of slander. Many of those claims were dismissed in summary judgment motions filed by Club Car, Murphy, Champigny, and IRCL, a former defendant in this case. Despite acknowledging in its response to Club Car's summary judgment motion that it did not intend to pursue each and every counterclaim it had levied, CCQ MSJ Resp. Brief at 12, CCQ waited until the week before trial to inform its adversaries of the claims it would pursue at trial. In the pretrial conference, CCQ stipulated that it would limit its claims at trial to those specified in its motion to amend the pretrial order. Doc. 337. On the first day of trial, CCQ filed a second motion to amend the pretrial order, raising claims not included in its prior motion. The Court issued an order stating that

with regard to CCQ's motion to amend its pretrial order, it appears that CCQ seeks to include independent claims for defamation and violation of a duty of good faith against EPC and Pierre Champigny. CCQ has been allowed ample time to streamline its case and to clarify the bases of its claims for relief. The Court will not allow CCQ to slip claims for relief back into the case at this time. The claims presented by CCQ in its first motion to amend its pretrial order on February 3, 2003, which was granted by the Court, are the claims available for submission to the jury in this case.

Doc. 403 at 2, 3. The Court addressed CCQ's complaint of unfair surprise by the application of Quebec law in the same order:

While the Court concurs with the sentiment that the timing of EPC's motion has complicated preparation for trial, CCQ cannot claim unfair surprise. Both CCQ' s factual allegations against EPC and the rule of lex loci delecti[22] have existed since CCQ filed its consolidated counterclaim complaint in this case. EPC moved the Court for a determination of law, not for the introduction of any novel factual allegation or theory of relief. CCQ should have been aware since it filed its counterclaim complaint that the application of Quebec law is proper. It cannot complain now of unfair surprise resulting from its own counterclaim charges.

Id. at 3.

CCQ stipulated to the claims it would raise at trial in the pretrial hearing. The Court's decision to apply Quebec law was not a "change" to the law applicable in

this case, but a clarification of the locus of the legal standards to be applied under Georgia's lex loci delecti rule. CCQ cannot claim to be surprised by the Court's ruling, as the facts necessitating the ruling, those indicating the locus of CCQ's alleged injury, have been known for months and were a part of CCQ's own counterclaim complaint. The Court properly held CCQ to its pretrial stipulation and refused to add last-minute claims to this action, and CCQ is not entitled to a new trial on this ground.

F. Ex Parte Communications

CCQ next contends that counsel for EPC and Champigny engaged in improper ex parte communications with the Court. Specifically, CCQ claims that counsel for EPC and Champigny distributed to the Court a copy of a page from a damages handbook relevant to the admissibility of Ryan's expert testimony on damages, that the copy was not entered as an exhibit, and that no copy was distributed to CCQ's counsel. CCQ further contends that the Court's exclusion of Ryan's testimony was based on the alleged ex parte communication.

At the close of evidence, as counsel for EPC and Champigny, Jim Purcell, was bringing a motion under Daubert, the following exchange occurred between Purcell and CCQ's counsel, Jeff Harris:

MR. PURCELL: Your Honor, it's right there in the page that I gave the Court earlier on the consideration of testimony, on page 281 of the reference guide of damages in the reference manual on scientific evidence. It's got a section on economic damages and what's in

and what's out and how you compute those damages. And it's exactly how he didn't. And the jury doesn't need to be dealing with $10 million today.
MR. HARRIS: I'm not sure what --
MR. PURCELL: And it's sheer orchestrating and lawyer arguments about how it is or isn't the legitimate standard.
MR. HARRIS: I'm not sure what submission to the Court he's referring to.
MR. PURCELL: The one I put back there on your desk.
MR. HARRIS: This was submitted, apparently, before, and I never -- I wasn't aware of that Trial Tr., vol. IV, at 216-17. After a recess, counsel for each party met at sidebar, with Darren Penn speaking as counsel for CCQ
MR. PENN: If I may say something? This is the first time we have seen this document, and I want to let you know and put it on the record that this was misrepresented by Mr. Purcell. It does not say what he says it did. It's from a reference guide.
THE COURT: I cannot help that. I have not read i t. Trial Tr., vol. IV, at 222 (emphasis added).

From the transcript it appears that counsel for EPC and Champigny attempted to bring to the Court's attention a copied page from a damages handbook, and that he placed a copy of the page on the desk of CCQ's counsel. More importantly, though, the Court never looked at or considered the document. Because the record indicates that the Court did not consider material submitted ex party in this case, CCQ is not entitled to relief on the issue.

G. Jury Instructions

CCQ enumerates in a conclusory fashion a number of other asserted errors in the Court's instructions to the jury. The Court will consider each contention in turn.

CCQ first asserts that"[t1he Court failed to properly instruct the jury on the issue of distributor pricing in CCQ' s beach of contract claims." Doc. 435 at 5. CCQ does not delineate which of its proposed jury charges on "distributor pricing" the Court did not include, and the Court has found no proposed charges dealing with "distributor pricing." "[E]ach party is responsible for requesting whatever jury instructions it may deem appropriate, and failure to so request, or to object to an instruction deemed inappropriate, precludes assigning as error the giving or the failure to give an instruction." McElroy v. Firestone Tire & Rubber Co., 894 F.2d 1504, 1510 n.10 (11th Cir. 1990) ; Ad-Vantage Tel. Directory Consultants v. GTE Directories Corp. , 849 F. 2d 1336, 1349 (11th Cir. 1987) ("[A] litigant is entitled to have the jury instructed on its theory of the case, if there is any competent evidence to support the theory, and if the instruction is properly requested."). Furthermore, CCQ fails to illustrate any manner in which it was prejudiced by the asserted error in the jury instruction. CCQ next asserts that "[t]he Court instructed the jury that it could not find in favor of CCQ on either conspiracy or punitive damages claims unless all of the conduct related to those claims occurred in the State of Georgia." Doc. 435 at 5. The Court delivered the following instructions to the jury:

Punitive damages must relate to the state in which the illicit activity occurred because such damages are based on a state's interest in protecting its own consumers and its own economy. This means that your punitive

damage award cannot be based on any conduct of EPC or Club Car that occurred outside of Georgia. You must find that EPC and Club Car committed conspiratorial acts in the state of Georgia to find in favor of CCQ on its punitive damage claim. If you find that some or all of EPC's or Club Car's conspiratorial acts occurred outside of Georgia, you may not award punitive damages to CCQ based on those activities.

Jury Inst. at 27-28. The court's charge is an accurate reflection of the principle that one state may not punish conduct occurring in a neighboring state, or in this case a neighboring country. See BMW v. Gore, 517 U.S. 559, 571-74 (1996) ("[A] state may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."). Accordingly, the charge was an appropriate and accurate reflection of existing law.

CCQ next contends that " [t] he Court failed to instruct the jury concerning the tortious interference claim against Champigny." Doc. 435 at 5. The Court, however, did instruct the jury extensively on CCQ's tortious interference claims against EPC and Champigny. Jury Inst. at 15-19. Thus, CCQ's contention is contradicted by the record.

Finally, CCQ contends that " [t]he Court failed to properly instruct the jury on bad faith in business negotiations and defamation under Quebec law." Those claims, however, were not listed in CCQ's amended pretrial order and the Court denied CCQ's motion to amend its pretrial order after the initiation of trial. Accordingly, CCQ may not obtain relief on this ground.

So long as "the jury charges, considered as a whole, sufficiently instructed the jury so that jurors understood the issues and were not misled," a new trial is not warranted. Schafer v. Time, Inc., 142 F.3d 1361, 1368 (11th Cir. 1998).

CCQ has not illustrated that the Court erred in its instructions to the jury, nor has it shown prejudice from any asserted error, and it may not obtain a new trial on these grounds.

H. Motion to Amend Deposition Designations

CCQ next contends that the Court's failure to rule on its "motion to amend deposition designations" entitles it to a new trial. In its motion, which was filed on the first day of trial contemporaneously with three other motions, CCQ "move[d] the Court to reconsider objections to deposition designations related to CCQ' s claims against Champigny under the applicable Quebec law." Doc. 388 at 4. In substance, CCQ's motion constituted a restatement of its objection to the Court's ruling on the applicability of Quebec law to this case. See id. at 1-3.

Contrary to CCQ's assertions, the Court denied the motion in its order of February 11, 2003. Doc. 403 at 2. Because the Court did rule on the motion, and because CCQ's assertions concerning the applicability of Quebec law, as the Court has already ruled, are without merit, CCQ may not obtain a new trial on this ground.

I. Attorneys' Fees and Costs

CCQ next contends that Club Car is not entitled to

attorneys' fees and costs in this litigation. While the jury did not award Club Car attorneys' fees and costs in its verdict, the Court determined that Club Car was entitled to such under the distributorship agreement after it had filed a Rule 50(b) motion for judgment as a matter of law.

Under paragraph 20 of the distributorship agreement between Club Car and CCQ, which was admitted into evidence at trial as Plaintiff's Exhibit 1,

In any action or proceeding commenced by or against Club Car relating to or arising out of this Agreement, whether such action or proceeding be founded upon contract, tort, statute, regulation or otherwise, Club Car shall be entitled to recover from Distributor its costs and expenses (including but not limited to reasonable attorney's fees) of prosecuting and/or defending any such action or proceeding in which Club Car has substantially prevailed. For purposes of this Agreement, Club Car shall be considered to have "substantially prevailed" in such action or proceeding if its net recovery therein exceeds that of the Distributor in the same action or proceeding . . . .

The jury in this case awarded Club Car $1,457,360 more than it awarded CCQ, the "Distributor" under the contract. Accordingly, under the terms of the contract, which were not disputed at trial,[23] Club Car was entitled to attorneys' fees and costs. Because the construction of a contract is a question of law, Magnetic Resonance Plus, Inc. v. Imaging Systems Int'1, 273 Ga. 525, 526, 543 S.E.2d 32, 34 (2001), and because the terms of paragraph 2 0 appear unambiguous, the Court found that, notwithstanding the jury verdict, Club Car was

entitled under the distributorship agreement to recovery of attorneys' fees and costs against CCQ. Doc. 445 at 2.

CCQ is unable to offer evidence contradicting the clear language of the distributorship agreement. Accordingly, the Court will sustain its prior order awarding attorneys' fees and costs to Club Car in its claim against CCQ.

J. Murphy's Finances

CCQ next contends that the Court erred in allowing Club Car to present evidence concerning Murphy's financial activity. The Court ruled in Section II.F of this Order that Murphy's financial activity was relevant to this action and thus admissible. For the reasons set forth in that Section, supra, CCQ may not obtain relief on this ground.

K. Fraud and RICO Claims

CCQ claims that the Court errantly dismissed CCQ's fraud and RICO claims in its summary judgment order of January 17, 2003. CCQ makes this assertion in a conclusory fashion, Doc. 435 at 7, and makes no argument, points to no newly discovered fact, and cites no caselaw supporting its position. For the reasons stated in the Court's order of January 17, 2003, Doc. 326, CCQ's claims of fraud and its claims under RICO fail to state a claim on which relief may be granted, and the Court will not allow CCQ a new trial on this ground.

L. Other Claims Addressed in the Court's January 17, 2003, Order CCQ next asserts that "the Court

effectively granted summary judgment on CCQ's claims of conversion, money had and received, and breach of the used car agreement-though [Club Car] had not even moved for judgment on these issues." Doc. 435 at 7. While CCQ is correct in that Club Car did not raise the issues of conversion, money had and received, and breach of contract in its summary judgment motion, those issues were properly before the Court because CCQ had moved for summary judgment on those issues. Doc. 326 at 40. The Court found that "CCQ does not assert that it demanded the return of the QST funds, . . . a disputed issue of material fact exists as to who is in possession of the funds, and . . . money is generally not a proper subject of conversion actions," d. at 42--43; "a disputed issue of material fact exists as to whether [Club Car] has been enriched unjustly through CCQ' s submission of QST payments [on the claim of money had and received] , " Id, at 41; and that CCQ' s summary judgment motion on the used cart agreement could not succeed because the agreement was indefinite in duration, failed to satisfy the statute of 61 frauds, and, even if enforceable, could be terminated at any time by either party. Id. at 43-44.

The Court made the determinations necessary to rule on CCQ's motion for summary judgment. If the language in the Court's order proved dispositive on the issues raised by CCQ, then CCQ has no one to blame but itself. CCQ' s motion for new trial cannot succeed on this ground.

M. IRCL

CCQ further asserts that the Court erred when it dismissed IRCL from this action in its order of January

17, 2003. Specifically, CCQ contends that [p]rior to trial the Court dismissed Ingersoll Rand f rom the action, though questions of fact remained as to Club Car's commission of fraud, conversion, money had and received, theft by deception, and resulting violations of the Georgia RICO statute, and as to whether Club Car's parent company [IRCLI received funds from any of Club Car's illicit activities as prescribed under the Georgia RICO Act.

Doc. 435 at 7. The Court granted IRCL's motion for summary judgment and dismissed it from the case because CCQ's claims for fraud and RICO violations lacked merit and because IRCL was not yet in existence during the time periods that CCQ alleges illicit activity occurred. Doc. 326 at 30. CCQ cites no newly discovered facts or rule of law that would change the outcome of IRCL' s motion for summary judgment. Accordingly, CCQ may not obtain a new trial on this ground.

N. Scheduling Order

CCQ asserts that the Court "issued its scheduling orders to impede CCQ's conduct of the litigation." Doc. 435 at 7. CCQ, however, had ample opportunity to conduct discovery prior to the close of discovery on September 1, 2002. As the Court held in Section II.H of this Order, the trial schedule in this case prejudiced neither Murphy nor CCQ. CCQ's conclusory assertion that the Court's scheduling order caused it to be prejudiced to the extent that it is entitled to a new trial lacks merit and cannot be successful.

O. Trial De ositions

Finally, CCQ asserts that the Court erred in excluding the trial depositons of Lynda Capaddocia and Russ Hooper. CCQ previously had taken the deposition of Hooper on two occasions, but Capaddocia had not been deposed and was not identified as a potential witness by CCQ. CCQ filed a motion approximately one month before trial seeking to depose Capaddocia and Hooper for purposes of trial. The Magistrate Judge denied the motion because CCQ failed to depose the witnesses prior to the close of discovery and because the Federal Rules of Civil Procedure do not distinguish between "trial depositions" and regular discovery depositions. Doc. 333; see Tatman v. Collings, 938 F.2d 509, 510-11 (4th Cir. 1991) (recognizing no distinction between trial and discovery depositions).

The Court finds that CCQ had ample opportunity to depose Capaddocia and re-depose Hooper prior to the close of discovery. Instead, CCQ waited until the proverbial eve of trial to seek the untimely depositions of the two witnesses. The Magistrate Judge properly denied CCQ the right to take the depositions, and CCQ may not obtain a new trial on this issue.

IV. CONCLUSION

The Court has carefully considered the positions of each party to this action. Although a "new trial may be granted even when substantial evidence supports the jury's verdict,"12 MOORE'S FED. PRACTICE § 59.05[5] (3rd ed. 1999), allowing the jury's verdict to stand here would not result in a miscarriage of justice. CCQ's motions for judgment as a matter of law under Rule 50 (b) and for a new trial under Rule 59 are DENIED. Likewise, Murphy's motions under Rule

50(b) and Rule 59 are DENIED.
SO ORDERED this day of May, 2003.

Footnotes

Fn1The jury awarded CCQ damages in the amount of $100,000 (Can.) on its counterclaim against Club Car, but the damages were offset against the $1,557,360 (Can.) Club Car recovered in its claim against CCQ.

Fn2Bentley held the position of national sales manager with Club Car from 1996 through 1998. Prior to 1996, he served within the company as credit manager and he now serves as director of "eastern direct zone sales."

Fn3CCQ contends that, while the right to receive commissions was terminated in the letter, the used cart agreement was not terminated insofar as CCQ retained a right of first refusal on all used golf carts sold in its territory. Club Car contends that the letter ended the arrangement in its totality.

Fn4 The carryall vehicle is distinct from the golf cart in that it is designed for industrial, rather than personal, use. CCQ contracted to sell Club Car's turf utility vechicles.

Fn5Club Car contends that the delay in submitting the application was the result of added responsibility placed on Speering, the resignation of her supervisor, and "a personal matter that Speering was experiencing at the time." P1. MSJ Brief at 9.

Fn6 On the damages side, Quebec law does not provide

for punitive damages, while Georgia law does. Because the jury did not find EPC or Champigny liable in tort, however, the issue of punitive damages is without import.

Fn7 For the most part, in filing his requests to charge under Quebec law, Murphy merely inserted the following sentences into the Georgia version of the requested charges he had filed previously:

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in his duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral, or material in nature. Article 1457 Code Civil de Quebec (C.C.Q.).

Fn8 Because instruction on the principles of Quebec tort law was included in the Court's instructions on tortious interference with business relations, the Court did not repeat them in its instructions on tortious interference with a contract, which immediately followed.

Fn9Murphy's counsel, in fact, neglected to submit jury charge requests applicable to any of the claims levied against him by Club Car.

Fn10CCQ points to this Court's determination in a January 17, 2003, order that its claims under a used cart agreement lacked merit because the agreement was of

indeterminate length, and thus unenforceable. Unlike the personal guaranty, the used cart agreement, which was never memorialized in writing, had no provisions for its termination by either party. The Court also found the agreement unenforceable because, as an oral contract purporting to extend in duration for more than a year, it violated the statute of frauds. Furthermore, even if the agreement were enforceable, either party would have the prerogative to terminate it at any time, which is what Club Car did. Thus, the Court's ruling on the personal guaranty issue is not inconsistent with its ruling in the prior order regarding the used cart agreement.

Fn 11Georgia's long-arm statute is codified at o.C.G.A. § 9-10-91(1):

> A court of this state may exercise personal jurisdiction over any nonresident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

(1) Transacts any business within this state;
(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;
(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
(4) owns, uses, or possesses any real property situated within this state; or

(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

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(1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(4) owns, uses, or possesses any real property situated within this state; or

(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

Fn12Murphy withstood cross examination from Club Car's counsel on February 10 and February 11, 2003. Trial Tr., vol. I, at 136-158, vol. II, at 1-13. He underwent direct and cross examination on February 12 and February 13. Id. vol III, at 177-186, 241-307, vol IV, at 1-12.

fn13Prior to granting Murphy a short recess to compose himself for further questioning, the Court instructed the jury that "Mr. Murphy has had some physical problems over the past year that may interfere, and probably is right now, with his testifying." Trial Tr., vol. IV, at 186. At the conclusion of the recess, the Court, upon request by Murphy's counsel, allowed Mr. Murphy to step down and his wife to take the stand for direct examination. Id.

Fn14Anita Murphy testified in deposition that the Quebec tax authority "told us that they were going to bill us $124,000 of QST that we had claimed because we had paid Club Car, Inc. . . . Club Car, Inc. was not mandated to collect the sales tax, they had no sales tax number, [and] over the past two years had not remitted any sales tax to the government of Quebec." Dep. of Anita Murphy 2, vol. 2, at 151.

fn15As the Court finds infra, the Magistrate Judge's denial of CCQ's motion to depose Lynda Capaddocia, a Quebec government official, likewise was not in error.

fn16 Counsel for EPC and Champigny objected to Ryan's testimony on the basis of his qualifications as an expert. Ryan testified that he was a close friend of Murphy, a business advisor to Murphy, qualified as a

chartered accountant in Quebec and worked as an accountant from 1966 to 1971, had never published a paper in the accounting field, had never done a study on economic damages before this case, and had never testified as an expert witness before this case. Trial Tr., vol. IV, at 17-20. The Court allowed counsel for each party to conduct a voir dire examination of Ryan in the presence of the jury on his qualifications to give expert testimony, and the Court heard arguments in a hearing outside the presence of the jury on the issue of Ryan's qualifications. The Court ultimately found him qualified to give expert testimony. Trial Tr., vol. IV, at 23-24.

fn17 In diversity actions, determination of damages is controlled by the law of the forum state. Complete Concepts, Ltd, v. General Handbag Corp., 880 F.2d 382, 389 (11th Cir. 1989).

fn18 CCQ contends that Ryan's testimony was excluded on the basis of his credibility. As the Court has noted, however, the record indicates that the Court allowed Ryan to testify after hearing evidence concerning his qualifications as an expert witness. The Court excluded evidence instead because Ryan's methodology was flawed. The method he used in calculating lost profits clearly did not comport with generally accepted accounting standards.

fn19 CCQ mistakenly asserts that "most of the damages excluded by the Court did incorporate cost factors." Doc. 436 at 3. According to the Court's instruction to the jury testimony concerning any such damages would not have been excluded. The Court only excluded "Mr. Ryan's testimony as to damages, when he says that he did not take into consideration the expenses involved

and merely used the gross amount." Trial Tr., vol. IV, at 222. The Court did not exclude the totality of Ryan's testimony. Thus, any testimony elicited from Ryan that took costs into account, by the terms of the Court's instruction to the jury, was not excluded and the jury was free to consider such testimony in its deliberations. If CCQ is correct that most of the damage testimony elicited from Ryan "incorporated cost factors," then it would follow that most of the damage testimony was not excluded by the Court's instruction.

fn20 CCQ cannot show prejudice in any case in its claims against EPC and Champigny, as the jury found no liability in those claims and did not reach the issue of damages. A party cannot show prejudice from the exclusion of damages testimony where the jury never reaches the issue. Scheib v. Williams -McWilliams Co., 628 F. 2d 509, 510 (5th Cir.1980).

Fn21See Busch v. Dyno Nobel, Inc., 40 Fed. Appx. 947, 961 (6th Cir. 2002) (recognizing that court is "not required to hold a formal Daubert hearing").

Fn 22 Under the rule of lex loci delecti in the State of Georgia, the law applied in the locus of CCQ' s injuries, the Province of Quebec in this case, should be applicable to claims raised concerning those injuries. Doc. 403 at 2.

fn23 CCQ neither disputed the language or implications of paragraph 20 nor did it challenge the overall enforceability of the distributorship agreement. Instead, CCQ's position at trial was that an ambiguity existed in the "non-exclusivity" clause of the Agreement and that Club Car's actions rendered impossible CCQ's

performance of the contract. Even if CCQ's position had been that the Agreement was non-enforceable in its entirety, the jury verdict indicates that the jury found, as a factual matter, that an enforceable contract existed between Club Car and CCQ.

VERDICT

1. We, the jury, find in favor of the Plaintiff, Club Car, on its claim against the Defendant, Club Car Quebec ("CCQ"), in the amount of $1557360000

If you awarded damages to Club Car in item (1), proceed to item (2) . If you did not award damages to Club Car in item (1), proceed to item (3).

2. We, the jury, find in favor of the Plaintiff, Club Car, against the Defendant, CCQ, on its claim for attorneys' fees and costs associated with this litigation.
Yes No

If you awarded damages to Club Car in item (1) , proceed to items (3) and (4). If you did not award damages to Club Car in item (1), proceed to item (5).

3. We, the jury, find in favor of the Plaintiff, Club Car, against the Defendant, Martin Murphy, on its claim for damages under the surety agreement admitted as evidence in this trial.
Yes No

If you answered "yes" in item (3), proceed to item (4). If you answered "no" in item (3), proceed to item (5).

4. We, the jury, find in favor of the Plaintiff, Club Car, against the Defendant, Martin Murphy, on its

claim for attorneys' fees and costs associated with this litigation.

Yes No

5. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Club Car, on its counterclaim in the amount of *$100,000*

If you awarded damages to CCQ in item (5), proceed to items (6) and (7). I f you did not award damages to CCQ in item (5), proceed to item (8).

6. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Club Car, on its counterclaim for attorneys' fees and costs associated with this litigation.

Yes No

7. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Club Car, on its counterclaim for punitive damages.

Yes No

8. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Equipements Pierre Champigny (11EPC11), on its counterclaim in the amount of $ *0*

If you awarded damages in item (8), proceed to items (9) and (10). If you did not award damages in item (8), proceed to item (11).

9. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, EPC, on its counterclaim for attorneys' fees and costs associated with this litigation.

Yes No

10. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, EPC, on its counterclaim for punitive damages.

Yes No

11. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Pierre Champigny, on its counterclaim in the amount of $ 0

If you awarded damages in item (11), proceed to items (12) and (13). If you did not award damages in item (11), proceed to item (14).

12. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Pierre Champigny, on its counterclaim for attorneys' fees and costs associated with this litigation.
Yes No

13. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Pierre Champigny, on its counterclaim for punitive damages.

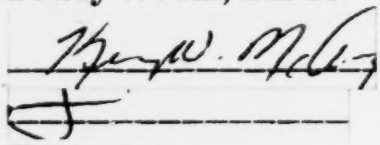
Yes No

14. (If you awarded damages in items (8) or (11),

proceed to the end of this verdict form. If you did not award damages in items (8) or (11) , then complete item (14) . Having found in favor of the Counterclaim Defendant, EPC, and the Counterclaim Defendant, Pierre Champigny, we, the jury, find that EPC and Pierre Champigny are entitled to recover attorneys' fees and costs associated with this litigation from CCQ.

Yes No

So Say We All, this 14th day of February, 2003.



Foreperson

CLUB CAR, INC., : Case No. CV100-195

:

Plaintiff, :

:

vs. :

:

CLUB CAR (QUEBEC) IMPORT INC. :

and MARTIN MURPHY, :

:

Defendants. :

:

********** :

:

CLUB CAR (QUEBEC) IMPORT, INC. :

:

Counterclaim Plaintiff, :

:

vs. :

:

CLUB CAR, INC.; PIERRE CHAMPIGNY; :

and EQUIPEMENTS PIERRE CHAMPIGNY, :

LTD., : Augusta, Georgia

: February 13, 2003

Counterclaim Defendants. :

:

_____:

VOLUME 4

TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ANTHONY A. ALAIMO

United States District Judge and a Jury

Reported By: Norma Hatfield

Official Court Reporter

801 Gloucester Street, Rm. 216

Post Office Box 1316

Brunswick, Georgia 31521-1316

(912) 262-9989 FAX (912) 262-9100

normah@thebest.net

0012

01 Q And do you remember this language being in the website

02 back in the late '90s?

03 A I believe so, yes.

04 Q Now yesterday, Mr. Ellington asked you if you would

05 have bought all of the used cars if you had had the same

06 deal as Champigny, and you said, "You betcha."

07 My question to you is: Were you offered the same deal

08 as Mr. Champigny -- ever?

09 A That's the crux of the problem. I wasn't offered the

10 same deal.

11 MR. PENN: Thank you.

12 THE COURT: Anything else?

13 MR. ELLINGTON: Nothing else, Your Honor.

THE COURT: All right. You may stand down, Mr.

Murphy.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. HARRIS: Your Honor, we would call Peter Ryan.

MR. ELLINGTON: Your Honor, we have a matter that

should be taken up outside of the jury's presence with

respect to Mr. Ryan's testimony.

THE COURT: Did you know that Mr. Ryan was going

to be called?

MR. ELLINGTON: Not at 9:00 o'clock. We had Mr.

Murphy coming in first.

0013

01 THE COURT: Nevertheless, did you know he was

02 going to be called?

03 MR. ELLINGTON: We knew he was going to be called

04 this morning.

05 THE COURT: I wonder why you did not call my

06 attention to that before the jury came in.

07 MR. ELLINGTON: I apologize, Your Honor, but this

08 is a matter that should be taken up outside the jury's

09 presence.

10 THE COURT: Well, do you want to come up to

11 sidebar?

12 (At sidebar on the record)

13 MR. ELLINGTON: Your Honor, Mr. Ryan is going to

be testifying --

THE COURT: I cannot hear you.

MR. ELLINGTON: Your Honor, Mr. Ryan is going to

be testifying on behalf of CCQ against the counterclaim

co-defendants and offering scientific or expert testimony.

We believe the Court should examine its gatekeeper function

with respect to Mr. Ryan --

THE COURT: You should have called my attention to

it long before this.

MR. HARRIS: Absolutely, long before this.

(End of discussion at sidebar)

THE CLERK: Would you raise your right hand to be

0014

01 sworn?

02 PETER J. RYAN, DEFENDANT CCQ'S &

03 MARTIN MURPHY'S WITNESS, SWORN

04 THE CLERK: You can be seated.

05 Please state your full name, spell your last,

06 state your residence and occupation.

07 THE WITNESS: My name is Peter George Ryan,

08 R-Y-A-N. I live in Oakville, Ontario, in Canada.

09 DIRECT EXAMINATION

10 BY MR. PENN:

11 Q Good morning. You have traveled a very long way to be

12 here this morning.

13 A Yes, I have.

14 Q Where did you come from?

MR. PURCELL: Your Honor, I'm going object to

that. It doesn't matter where he's traveled from.

THE COURT: It really does not. We accommodated

you by waiting anyhow. But go ahead.

MR. PENN: I apologize, Your Honor.

BY MR. PENN:

Q If you could, please describe for us your educational

background?

A I received my preliminary education in Ontario. I

attended University of Windsor in Windsor, Ontario where, I

graduated with an Honours, Bachelor of Business.

0015

01 I then completed the Chartered Accountants program in

02 the Province of Quebec and was admitted to the Institute of

03 Chartered Accountants in Quebec and subsequently in the

04 Province of Ontario.

05 THE COURT: Would you give us the dates of these

06 things? When did you graduate?

07 THE WITNESS: I graduated in 1966. I was admitted

08 to the Quebec Institute of Chartered Accountants in 1970 and

09 to the Ontario Accountants in 1986.

10 MR. PENN:

11 Q And you mentioned Chartered Accountants. What does

12 Chartered Accountants mean?

13 A The Institute of Chartered Accountants in Canada would

14 be the equivalent of the certified public accountant in the

15 United States.

16 Q And can you just briefly go over with us a little bit

17 of your work history?

18 A I worked for a firm of chartered accountants in the

19 City of Montreal from 1966 to 1971. I was employed by the

20 Canadian Subsidiary, a private Swiss bank, from 1969 to

21 1973.

22 I traveled overseas in Europe and Australia from 1973

23 to 1976.

24 I returned to work for the Swiss bank on my return to

25 Montreal.

0016

01 I then worked for a company which was an importer and

02 manufacturer of sporting goods, primarily sporting goods.

03 And subsequent to that, I worked for a communications

04 and telemedia, a Canadian company.

05 And then, after moving to Toronto in 1986, I worked

06 with Mr. Paul Boffman managing his personal companies and

07 acquiring companies for him.

08 Q Do you have experience in evaluating businesses?

09 A Throughout my business career, I have been involved in

10 several acquisitions on behalf of the parties that I work

11 for. And part of that process would involve analytical work

12 in these evaluations.

THE COURT: Mr. Penn, did you file a CV in this case?

MR. PENN: We did, Your Honor.

THE COURT: You did?

MR. PENN: We did.

THE COURT: All right. Go ahead. I generally handle that aspect of it.

MR. PENN: Okay. I'm sorry. I didn't know that's the procedure.

THE COURT: You know what the rule is. You were notified of that in the pretrial discussion. But nevertheless, go ahead.

MR. PENN: All right. Thank you, sir.

0017

01 Just to clarify, is my understanding of that to

02 just proceed on and not cover all of his qualifications if

03 the CV has already been filed?

04 THE COURT: Let me see the CV.

05 MR. HARRIS: Your Honor, we filed it in Savannah.

06 THE COURT: You do not have a copy? Well, that is

07 all right. We will find one here.

08 MR. HARRIS: We do, Your Honor, but I don't think

09 we brought it.

10 THE COURT: Well, I will ask him some general

11 questions.

12 Mr. Ryan, you have described your work history

13 since you graduated; have you not?

14 THE WITNESS: Yes, Your Honor.

THE COURT: Have you published anything in your specialty?

THE WITNESS: No, Your Honor.

THE COURT: Have you appeared as a witness, an expert witness, in any case before?

THE WITNESS: No, Your Honor.

THE COURT: All right. Mr. Ellington, do you desire to voir dire him on his qualifications?

MR. PURCELL: I do, Your Honor.

THE COURT: All right. Go ahead, Mr. Purcell.

MR. PURCELL: Thank you, Your Honor.

0018

VOIR DIRE EXAMINATION

BY MR. PURCELL:

Q Mr. Ryan, you have not been working in the public accounting business, have you?

A As a public accountant?

Q Yes, sir.

A No.

Q You are Mr. Murphy's best friend, aren't you, sir?

A He is a personal friend, yes.

Q And, Mr. Ryan, you, in evaluating this case and the opinions you have reached --

THE COURT: Wait a minute. I just want to go into the qualifications. Do you wish to cross-examine him on that?

MR. PURCELL: I wish, Your Honor, to see what the

witness did before the jury hears scientific testimony and

expert testimony in this case.

MR. HARRIS: I object. They've had an opportunity

to Daubert this witness for six months. Why they chose to

do it now, I don't know.

MR. PURCELL: Your Honor, that's not

discretionary. The Court must exercise its gatekeeper

function before the jury.

MR. HARRIS: But --

MR. PURCELL: May I finish? -- before the jury

0019

hears scientific evidence. Accounting evidence is well-known scientific evidence. This is --

THE COURT: All I want to do is question his qualifications, if you can.

MR. PURCELL: Yes, sir.

BY MR. PURCELL:

Q So you have never testified as an expert, have you?

A No.

Q You have never been offered as someone who appraised damages in an economic loss case, have you?

A No.

Q You have never studied the area of economic damages and reported any cases of economic damages, have you?

A I'm not clear on the question.

Q You have never done a study of economic damages on a

16 business loss case and reported on that before, have you?

17 A Before this, no.

18 Q As a matter of fact, this is your very first experience

19 in such an exercise, isn't it?

20 A Yes.

21 Q And you have never, in your entire career, been engaged

22 in the business of public accounting, even though you are a

23 chartered accountant in Canada; isn't that right, sir?

24 A No.

25 Q Isn't it --

0020

01 A No, that's not right.

02 Q You, for the past twenty years, you haven't been a

03 public accountant, have you?

04 A I have not been full-time employed in the practice of

05 public accounting.

06 Q In fact, the financial statements, which are here, I

07 believe, in evidence, were not financial statements of this

08 business that you prepared, were they?

09 A I couldn't answer that without some time frames.

10 Q Mr. Ryan, the financial statements bear on their very

11 face that they were prepared by somebody else; you're not

12 disputing that?

13 A Some financial statements were prepared by other

people, yes.

MR. HARRIS: Your Honor, I would object if he's going to examine him about financial statements.

MR. PURCELL: I'm not --

MR. HARRIS: Financial statements are --

MR. PURCELL: I'm just going into his qualifications.

THE COURT: Go ahead.

MR. PURCELL: Thank you.

BY MR. PURCELL:

Q And the information you gained, Mr. Ryan, was supplied by Mr. Murphy, wasn't' it?

0021

01 A The information that I gained was from my examination

02 of the financial records of Club Car (Quebec) and the other

03 companies involved.

04 I had been involved as a financial professional all my

05 working career. And the fact that I was not in the practice

06 of public accounting doesn't --

07 Q Thank you very much, Mr. Ryan, but if you can restrict

08 your answers to the question that was asked, and we can move

09 a little faster.

10 Mr. Ryan, you were at business meetings as a business

11 advisor helping the Murphys, weren't you.

12 A Yes, sir.

13 Q That was your role. We heard the testimony, and I

14 won't belabor that by going through all the meetings.

15 MR. PURCELL: Excuse me.

16 (Pause)

17 MR. PURCELL: That's all I've got on the witness'

18 qualifications at this time, Your Honor.

19 THE COURT: Mr. Ellington?

20 MR. ELLINGTON: Nothing in addition to what Mr.

21 Purcell has done.

22 THE COURT: Do you submit that he is not qualified

23 to give an expert opinion in this case?

24 MR. ELLINGTON: Yes, Your Honor. That is our

25 position. He is not qualified as an expert for the reasons

0022

01 laid out.

02 MR. HARRIS: Your Honor, can I respond?

03 THE COURT: Of course,

04 MR. HARRIS: He is the -- has been the accountant

05 for this company. He has been the financial advisor to this

06 company. There's no one who knows this company better than

07 this man. And he's going to talk about --

08 THE COURT: You are doing a good bit of

09 testifying. I did not hear all of that from the witness.

10 The fact of the matter is he indicates that he has

11 never really studied the business of -- the subject upon

12 which you have put him up here for.

13 MR. HARRIS: Your Honor, we think we can lay the

14 foundation that he's --

15 THE COURT: That's one of the problems here when

16 you have multiple lawyers. Since he put the witness up, I

17 will have him state the objection, if he has any.

18 MR. PENN: Your Honor, we believe we can lay the

19 foundation for Mr. Ryan's qualifications. And we got cut

20 off right in the middle of the foundation questions.

21 THE COURT: He already said that he had no

22 experience in that particular field.

23 MR. PENN: Your Honor, he has testified that he

24 has twenty years experience as a financial accountant, and

25 he has been the accountant for CCQ for 20 years.

0023

01 THE COURT: Well, he specifically said he had no

02 experience in that field and had never testified before in

03 that field.

04 I am going to sustain the objection.

05 MR. PENN: Your Honor, I don't believe -- he's not

06 testifying in the field of just public accounting. He's

07 testifying in the field as a financial advisor, financial

08 analyst, as well as his specific experience as an accountant

09 for CCQ over the last twenty years.

10 THE WITNESS: Your Honor --

11 THE COURT: Just a minute.

12 MR. PENN: Your Honor, we would request that the

13 jury be excused so we can have a hearing on this.

14 THE COURT: All right. Members of the jury,

please go to the jury room.

(Jury out at 9:29 a.m.)

MR. PENN: May I continue, Your Honor?

THE COURT: Yes.

MR. PENN: This is an absolute ambush on the morning this witness arrives from Australia to testify in this case. He has been identified as an expert for well over a year and a half. He has been deposed at least twice. They never raised a Daubert motion before. This Court gave detailed lines for filing a motion in limine, and they have not filed it.

0048

number of other documents that he couldn't match with anything that were back ordered parts.

And in addition to that, Your Honor, if they have an objection to that number, that is a matter for cross examination for credibility not admissibility.

THE COURT: All right. Go ahead.

And, members of the jury, you are the exclusive judges of the credibility of the witness. And merely because an expert witness testifies to certain matters as his opinion, you are not bound by that opinion. You may disregard it or give it credit.

So go ahead.

MR. PENN: Thank you, Your Honor.

BY MR. PENN:

Q Again, what was the number of the second one?

A The damages on the parts packages, the amount was $921,435.

18 Q Let's go down to the third line. And that's damages on

19 lower margins on new and one year old cars sold.

20 How did you arrive at that calculation?

21 A Using 1997 as a base year, before the impact of one

22 year old cars in the marketplace, Mr. Murphy and Club Car

23 (Quebec)'s gross margin was twenty point -- I think the

24 precise number is five six percent.

25 By analyzing Club Car (Quebec)'s results for the

0049

01 subsequent three years, I determined that there had been a

02 significant reduction in the margin from 1997. And based on

03 Club Car (Quebec)'s sales volumes for those years, I

04 determined the dollar value attributable to that reduction

05 margin.

06 Q What was the dollar value?

07 A The dollar value in my report is $414,986.

08 Q Now the fourth item.

09 MR. ELLINGTON: Your Honor, I'm going to object to

10 the fourth item. That has been ruled on in this case thus

11 far. That was a matter that was ruled on by Your Honor in

12 the late fall and was addressed last week.

13 MR. PENN: Could we have a sidebar, Your Honor?

THE COURT: I guess so.

(At sidebar on the record)

MR. PENN: Your Honor ruled that these damages, as to Club Car's damages, are part of the tort claims, the interference with the business arrangement.

MR. HARRIS: That was your ruling at the hearing.

THE COURT: Just one of you.

MR. PENN: I'm sorry.

MR. ELLINGTON: He said as to Club Car. They're out as to Club Car. I'll second that.

MR. HARRIS: You didn't ask --

MR. PURCELL: Judge, they are out as to us, as

0055

01 Q Okay. And then the last item you have on this list is

02 the delivery of refused eighty-two cars that were not

03 delivered.

04 A Yes. And the amount is --

05 MR. ELLINGTON: Objection, Your Honor. This claim

06 is not part of the case at this point, and we object to the

07 inclusion of any damages on this issue.

08 THE COURT: Sustained.

09 BY MR. PENN:

10 Q Also as a part of your report, did you do an evaluation

11 of the value of Club Car (Quebec)?

12 A Yes, I did.

13 Q And how did you do that calculation?

14 A Based on --

MR. ELLINGTON: Your Honor, I'm going to object.

There's nothing in this report in the summary about the valuation of Club Car (Quebec).

MR. PENN: Your Honor, I refer you to page 4 of the report which states, "A revised sales volume would be $3,563,548," and based on this --

THE COURT: Wait a minute. You said page 4?

MR. PENN: Page 4.

THE COURT: What finding are you referring to?

MR. PENN: I'm referring to the middle paragraph at the top of the page, that sentence that begins, "A

0056

01 revised sales volume would be," and he provides a number.

02 "Based on this, the company would have had an estimated

03 market value of..."

04 MR. ELLINGTON: Your Honor, I'm going to object to

05 his testifying to that figure

06 THE COURT: That is what it says.

07 MR. ELLINGTON: But, Your Honor, it's not part of

08 the summary of conclusions and damages.

09 THE COURT: It is part of his report. I will

10 allow the question.

11 BY MR. PENN:

12 Q Mr. Ryan, how did you calculate the value of the

13 business?

14 A Based on an analysis I had prepared of the annual sales

volumes of new and used cars, and again, my opinion -- an

appropriate valuation technique, considering the synergies

that would be involved in similar businesses, I used a

factor of 75 percent of the average of the last three years'

sales.

Q Okay. You said -- you refer to an evaluation

technique. Are there other ways to value businesses?

A There are virtually hundreds of different techniques

for valuing businesses.

Q And have you, indeed, valued businesses with various

different techniques over the years?

0057

01 A I have been involved, over the course of my business

02 career, on both sides of negotiations for purchasing or

03 selling a business and determining, through negotiations,

04 appropriate value.

05 Q Why did you chose this particular technique to value

06 CCQ?

07 A It was the simplest and most straightforward and I

08 think the most appropriate way of evaluating the company.

09 Q Why do you think it's the most appropriate under the

10 circumstances?

11 A Where the potential acquirer was in a similar business

12 and where their records were not available to me, it was not

possible to calculate the economies and synergies that they would benefit from.

So it would appear appropriate that if you acquired this business, that it would be pure add-on gross margins, that any additional sales would generate profits which would drop straight to the bottom line.

And, therefore, this was an appropriate technique.

Q Okay. And you used a calculation of 75 percent of the average three year sales volume?

A Yes, sir.

Q What was the average sales volume for CCQ?

A That is --

Q What was the number?

0108

01 Q And are you familiar with Mr. Douglas Cates, who is the

02 expert that's been retained by both of the other parties in

03 this case?

04 A I have read his report, yes.

05 Q You have read his report. Are you also aware that he

06 gave a technique for valuing a business?

07 A I believe it was mentioned to me that he has suggested

08 that a multiple of cash flow is an appropriate valuation

09 technique.

10 Q Do you remember what his multiple was from his

11 testimony?

12 A Three to seven.

13 Q And based on your experience and your knowledge of CCQ,

what was the cash flow of the business on a yearly bias?

A Again, looking at the cash flow, if you were transferring the operation to a similar business where the amount of the incremental administrative expenses would be minimal, I would have assessed the cash flow based on a sales volume of new vehicles and an average selling price and average gross margin.

And I would have determined that to be somewhere in the vicinity of six hundred thousand dollars a year.

Q So approximately six hundred thousand dollars a year?

A Arising from the sale of new cars.

Q Applying Mr. Cates' formula, that would give you a

0211

MR. HARRIS: No, Your Honor.

THE WITNESS: Thank you, Your Honor.

THE COURT: What do you have next?

MR. ELLINGTON: Club Car rests, Your Honor.

THE COURT: All right. The evidence is closed,

then; is it not?

MR. PURCELL: We still have some matters, Your

Honor.

THE COURT: Is the evidence closed?

MR. PURCELL: Yes.

MR. ELLINGTON: Yes, sir.

THE COURT: That was my question.

MR. PURCELL: Yes, sir.

THE COURT: Members of the jury, you are not going

to hear any more evidence. I am sure you are pleased with that.

But in any event, we have reached the point in the trial of the case where the attorneys will now address you one last time in what we call a final argument. Under our system, this is when the lawyers do their thing. This is where, by their argument, they go over the evidence they think you ought to accept that shows their side of the case is right and deserves a verdict at your hands.

Bear in mind, that is not evidence but merely the contentions of the parties. Under our system, that is their

0212

01 duty to do precisely that.

02 Now under our rules of procedure, the Plaintiff in

03 the case has the right to make an opening and a concluding

04 argument.

05 All right. You may proceed, Mr. Ellington.

06 MR. PURCELL: Your Honor, I have a motion to make.

07 THE COURT: I will permit you to do that after we

08 get through with these arguments just as if you had done it

09 now. I do not want to take up jury time when we can take

10 that up later.

11 MR. PURCELL: I understand that, Judge. But there

12 is a motion that I have to make on the evidence, not

13 about -- it's not a Rule 50 motion. It's a motion

concerning the economic testimony. And I think that the

sides, the parties, are entitled to know the Court's

intention with regard to that.

THE COURT: All right. Members of the jury, go to

the jury room.

(Jury out at 3:47 p.m.)

THE COURT: All right. Be seated.

Mr. Purcell?

MR. PURCELL: Your Honor, as to the testimony by

the accountant who testified, there is evidence only of

gross profits and gross sales. There is no testimony of

earnings or the effect on earnings.

0213

01 THE COURT: What do you say to that? What is the

02 value of his testimony when he does not take into

03 consideration the costs?

04 MR. HARRIS: The way he basically calculated it

05 was he looked the invoices, and he calculated --

06 THE COURT: I heard what he said.

07 MR. HARRIS: -- the lost profits or lost part

08 sales and the impact on the sale of new cars caused by

09 refurbished one year olds.

10 The thing I want to point out --

11 THE COURT: Mr. Harris, he clearly said that he

12 did not take into consideration the expenses in making his

13 or giving his opinion as to what was lost.

14 MR. HARRIS: Your Honor, they had the opportunity

to cross-examine him, and they had the opportunity to challenge his conclusions. I also want to point out --

THE COURT: They just did.

MR. HARRIS: -- they didn't put up any counter-witness to dispute those numbers. And they tried initially to make a Daubert motion. And they never put up any evidence to dispute the fact that the way he calculated those numbers was improper. They make a Daubert motion on the day of trial. They've had --

THE COURT: That is something else. We are talking about his testimony here, where he said he did not

0214

take into consideration the costs and expenses in arriving

at his opinion on what was lost

MR. HARRIS: Well, then he --

THE COURT: That is his only testimony.

MR. HARRIS: Then they can argue that he should

have taken that into account. That does not mean that the

testimony is not admissible.

THE COURT: That is sheer common sense.

MR. HARRIS: But, Your Honor --

THE COURT: They do not need testimony as to that.

MR. HARRIS: But, Your Honor, they can contend

that's it's improper for him to have done that. It doesn't

affect --

THE COURT: It is not improper. It just, really,

denigrates the value of his opinion.

MR. HARRIS: But, Your Honor, they didn't bring a

single expert witness in to sit in that chair and denigrate

the value of his expert opinion. That's --

THE COURT: He did it himself.

MR. HARRIS: If it was so bad, they could have

found someone to dispute it.

THE COURT: He did it himself.

MR. HARRIS: Well, Your Honor, they can challenge

that conclusion. They can argue to the jury that it's

improper. They can say --

0215

THE COURT: That is what he is doing now.

MR. HARRIS: Well, he's welcome to argue it to the jury, and he's -- he was welcome to put up contrary evidence, but he chose not to do it, and he chose to wait until the last second to dispute the testimony.

THE COURT: I am going to leave it in for whatever it is worth. But I am telling you the weakness of it.

MR. HARRIS: I understand that. I understand, Your Honor. He's more than welcome to argue. That's why we're here, to argue --

THE COURT: I thank you for that concession.

MR. PURCELL: Judge, I think under the federal rule, under the federal law, you are obligated to -- you

14 can't just let any evidence go to the jury.

15 MR. HARRIS: Now he's back to the Daubert motion.

16 MR. PURCELL: May I finish with my argument, Mr.

17 Harris?

18 You can't let any evidence go to the jury without

19 considering whether it's proper scientific evidence. And

20 this is exactly --

21 THE COURT: That is his objection; you are giving

22 a Daubert objection.

23 MR. PURCELL: I'm going to make that Daubert

24 objection all day long. There is no time that a valid

25 objection is time barred. There is no case that says a

0216

01 Daubert objection is time barred.

02 It is the Court's responsibility to exercise its

03 gatekeeper function and not let testimony like that, of $10

04 million, without considering the amount of money that it

05 takes to make $10 million, go to the jury. And --

06 THE COURT: Why not argue that point to the jury?

07 MR. PURCELL: Because, Your Honor, that's not my

08 job. It's your job not to let him have it.

09 MR. ELLINGTON: Your Honor, I am joining in his

10 objection.

11 THE COURT: I understand you are joining with

12 everything. You do not have to say it.

13 MR. PURCELL: Your Honor, it's right there in the

14 page that I gave the Court earlier on the consideration of

15 testimony, on page 281 of the reference guide of damages in

16 the reference manual on scientific evidence.

17 -- It's got a section on economic damages and what's

18 in and what's out and how you compute those damages. And

19 it's exactly how he didn't. And the jury doesn't need to be

20 dealing with $10 million today.

21 MR. HARRIS: I'm not sure what --

22 MR. PURCELL: And it's sheer orchestrating and

23 lawyer arguments about how it is or isn't the legitimate

24 standard.

25 MR. HARRIS: I'm not sure what submission to the

0217

01 Court he's referring to.

02 MR. PURCELL: The one I put back there on your

03 desk.

04 MR. HARRIS: This was submitted, apparently,

05 before, and I never -- I wasn't aware of that.

06 Your Honor, I would refer you to Rule 702. Now if

07 the expert calculates damages based on a standard accounting

08 way of calculating damages, then that amount is admissible.

09 If they want to dispute --

10 THE COURT: He never testified to that.

11 MR. HARRIS: If they want to dispute that he

12 should have deducted something, they can do that and they

13 could have to put up a witness. Why they would wait until

14 right now to ambush us when they could have filed a Daubert

15 motion six months ago after they deposed this guy twice is

16 beyond me. There is a way to do this.

17 THE COURT: Mr. Harris, you put the witness up,

18 and he testified. Now they did not have to demonstrate that

19 his opinion was worthless.

20 MR. HARRIS: Your Honor, these are good lawyers.

21 They know how the process is done. This man was deposed

22 twice. If they felt like his testimony was not -- pursuant

23 to 702, was not proper, they know how to file a Daubert

24 motion. They know how to --

25 THE COURT: That may be, but I let him testify;

0218

01 did I not?

02 MR. HARRIS: Yes, Your Honor.

03 THE COURT: And he, by his own testimony, destroys

04 the validity of it. So I am going to sustain the motion to

05 strike his opinion as to damages.

06 MR. HARRIS: Well, Your Honor, then that's the

07 equivalent of entering a directed verdict in this case.

08 THE COURT: Whatever it is equivalent to --

09 MR. HARRIS: Your Honor, if you are ruling -- they

10 have waited until the last second to bring up this issue.

11 They don't have a witness who will contradict this man's

12 testimony. He's an accountant. He has testified, and he

13 knows how to calculate damages. If they think he could have

14 deducted something from it, they can cross-examine him.

15 They did.

16 If they thought it was improper, they could have

17 put up a witness. Why they would wait until right now to do

18 this, to ambush us, I just cannot fathom.

19 THE COURT: Well, he made his motion -- I deferred

20 it somewhat -- at the conclusion of that witness' testimony.

21 MR. HARRIS: And exactly, Your Honor, if he didn't

22 know what that witness was going to say.

23 THE COURT: Why else would he have done it?

24 MR. HARRIS: He has deposed the witness twice --

25 THE COURT: That does not make any difference.

0219

MR. HARRIS: -- and he's waited until now to do this.

MR. PURCELL: Judge, we weren't even in the case when he was deposed.

THE COURT: Nevertheless, that is my ruling.

MR. HARRIS: Well, I'm at a loss as to how we proceed, Your Honor. You have, essentially, directed a verdict on damages based on his oral Daubert motion and based on the fact that there hasn't been any contrary --

THE COURT: After all, you had Mr. Murphy up here testifying, did you not, about his damages?

MR. HARRIS: He didn't testify about the damages

to his company.

THE COURT: I thought --

MR. HARRIS: Well, Your Honor, we put up a

witness, and they had the opportunity to Daubert that

witness pretrial. Is it Your Honor's --

THE COURT: Mr. Harris, you may except to the

ruling, but that is my ruling.

MR. HARRIS: Is Your Honor's ruling that the

verdict has been directed?

THE COURT: I did not say anything about that.

You are the one that is talking about directed verdicts.

I ruled out the evidence or the testimony of the

witness that demonstrates that his opinion is valueless.

0220

MR. HARRIS: Well, Your Honor, there is no testimony in the record now, since you have done that, on damages. There isn't any. You have now stricken the only damages expert. And, therefore, we cannot prove -- because you have stricken that damages expert, we cannot --

THE COURT: Mr. Murphy testified as to what he thought his damages were. That testimony is in the record.

MR. HARRIS: Respectfully, Your Honor, he didn't.

THE COURT: I have heard enough argument on that.

MR. HARRIS: I'm simply trying to find out how I should proceed, Your Honor. We have no evidence in the record on damages.

THE COURT: You are the lawyer. You are disregarding the testimony of your own client.

Bring in the jury.

MR. ELLINGTON: Your Honor, just for the record, before the jury comes in, we have a motion to bring before the Court under Rule 50. And I simply want it noted on the record.

THE COURT: We will take that up sometime later. I hate to keep the jury waiting.

MR. ELLINGTON: I understand. I hate to try Your Honor's patience, but could I simply ask for ten minutes at this point to gather my notes so I don't waste the jury's time in this closing argument?

\CIVIL ACTION NO. CV100-195
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
AUGUSTA DIVISION

CLUB CAR, INC.,
Plaintiff,

v.

CLUB CAR (QUEBEC) IMPORT, INC., and
MARTIN MURPHY,
Defendants.

and

CLUB CAR (QUEBEC) IMPORT, INC.,
Counterclaim Plaintiff,

v.

CLUB CAR, INC., PIERRE CHAMPIGNY,
EQUIPEMENTS PIERRE CHAMPIGNY, LTD.,
and INGERSOLL RAND CO.,
Counterclaim Defendants.

2/3/04

CLUB CAR QUEBEC'S MOTION TO MEND THE PRE-TRIAL ORDER

Club Car Quebec files this Motion to Amend the Pre-trial Order and shows the Court the following;

In paragraph 6 (b) of the pre-trial Order Club Car

Quebec provides a factual overview of its case. In order to assist the Court and the other parties in this matter Club Car Quebec submits this amendment to replace the current paragraph b (b). This amendment was prompted by EPC's recent Motion in Limine for Determination of Foreign Law because a review of that Motion suggests that the other parties may not clearly udetstand the specific claims that CCQ intends to present to the jury. For example, CCQ does not intend to pursue a claim for defamation, however such a claim is enumerated in EPC's Choice of Law papers. This amendment is designed purely to focus and crystallize the issues in this case for the benefit of all parties.

Proposed Amended Paragraph;

1. For approximately twenty years Club Car Quebec (CCQ) was a distributor of Club Car's new golf carts and new golf cart parts pursuant to a series of distributorship agreements approximately 1997, Club Car began to breach the distributor agreement by providing Q's competitor, Pierre Champany and his company, Equipements Pierre Champigny, with new parts and nearly new cars at below distributor pricing

2. Equipements Pierre Champigny (EPC conspired together with Club Car to breach the distributorship agreement and EPC tortiously interfered with CCQ's distributorship contract be receiving and reselling new parts and refurbished nearly new carts.

3. From 1993 until 1997 CCQ had a used car agreement under which Club Car provided CCQ a right of first refusal or a $ 100 commission on all used golf carts sold in CCQ's territory. Club Car breached that

agreement and failed to provide a right of refusal or a commission on numerous carts.

4. In 1997 Pierre Champigny insisted that Club Car terminate the used oar agreement and it did so at Champigny's urging, s a result Champigny tortiously interfered with CCQ's business relationship with Club Car.

5. Over a series of years Pierre Champigny insisted that Club Car make EPC the distributor in Quebec. He engaged in a persistent pattern of improper conduct designed to secure the distributorship from CCQ. In 2000, as a result of Champigny's improper influence, Club Car replaced CCQ with EPC as the distributor, tortiously interfering with CCQ's distributor relationship with Club Car.

6. Club Car collected Quebec sales tax from CCQ and had a fiduciary duty to CCQ to insure that the sales tax was properly remitted to the Quebec government. Club Car knowingly and willfully failed to properly remit the sales tax.

7. Before it terminated the distributorship relationship in 2000, Club Car set conditions far maintaining the distributorship and insisted that CCQ make a series of investments in the distributorship. CCQ acted in reliance on Club Car's assertions but was terminated anyway.

CIVIL ACTION NO. CV100-195

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
AUGUSTA DIVISION

CLUB CAR, INC.,
Plaintiff,

v.

CLUB CAR (QUEBEC) IMPORT, INC., and
MARTIN MURPHY,
Defendants.

and

CLUB CAR (QUEBEC) IMPORT, INC.,
Counterclaim Plaintiff,

v.

CLUB CAR, INC., PIERRE CHAMPIGNY,
EQUIPEMENTS PIERRE CHAMPIGNY, LTD.,
and INGERSOLL RAND CO.,
Counterclaim Defendants.

2/7/03

ORDER OF THE COURT

After hearing argument of counsel on February 4, 2003 at the pretrial hearing in the above-captioned matter; and after review of the motions and briefs, the Court finds as follows:

1. The motion by counterclaim defendants tquipements Pierre Champigny Ltd. and Pierre Champigny in limine for determination of foreign law filed January 31, 2003 is GRANTED, and the claims against those defendants will be determined by the law of Quebec.

2. The motion by plaintiff/counterclaim defendant Club Car and counterclaim defendant Equipements Pierre Champigny Ltd. And Pierre Champigny for a 12-person jury filed February 3, 2003 is DENIED.

3. The motion by plaintiff/counterclaim defendant Club Car in limine to exclude any counterclaims not raised in Club Car Quebec's Amended Counterclaim Complaint and to exclude reference to Martin Murphy's health filed February 3, 2003 is GRANTED provided that, should the state of Mr. Murphy's health during trial require an explanation to the jury, the Court will address the matter at that time.

4. Club Car Quebec's motion in limine to exclude practice with other companies to provide parts packages with used cars filed February 3, 2003 is SUSTAINED, but that portion of the motion in limine seeking to exclude evidence that Martin Murphy transferred assets to his wife, Anita Murphy, is DENIED.

5. The motion to realign the parties contained in the Consolidated and Proposed Pretrial Order is DENIED.

6. Objections to documentary evidence and objections to deposition testimony designations are referred to Magistrate Judge W. Leon Barfield.

7. The Court reserves its ruling on the issue of punitive damages and will permit the parties to supplement charges in view of the rulings heretofore mentioned.

8. The Court GRANTS Club Car Quebec's motion to amend the pretrial order filed February 3, 2003.

FILED
U.S. Court of Appeals
Eleventh Circuit
June 29, 2004
Thomas K. Kahn
CLERK

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CLUB CAR, INC.,
Plaintiff-Counter Defendant-Appellee,

Versus

CLUB CAR (QUEBEC) IMPORT, INC., MARTIN MURPHY,
Defendant-Counter Claimant-Appellant,

MARTIN MURPHY,
Defendant-Appellant,

PIERRE CHAMPIGNY, EQUIPMENTS PIERRE CHAMPIGNY, LTD.,
Counter-Defendants-Appellees,

INGERSOLL RAND CO., LTD.,
Counter-Defendant.

On Appeal from the United States District Court for the Southern District of Georgia

ON PETITION (S) FOR REHEARING AND
PETITION (S) FOR REHEARING
EN BANC

(Opinion_____, 11th Cir., 19__,
___F.2d_____).

Before: EDMONDSON, Chief Judge, BIRCH and FARRIS*, Circuit Judges.

PER CURIAM:

The Petition(s) for rehearing are DENIED and no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for rehearing en banc are DENIED.

ENTERED FOR THE COURT:

_____
CHIEF JUDGE

*Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

(4)

No. 04-421

Supreme Court, U.S.
FILED
OCT 27 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CLUB CAR (QUEBEC) IMPORT, INC.
and MARTIN MURPHY,

Petitioners,

v.

CLUB CAR, INC.;
PIERRE CHAMPIGNY; and
ÉQUIPEMENTS PIERRE CHAMPIGNY, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENT CLUB CAR, INC. IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Club Car, Inc. has the following parent corporations:

Clark Equipment Company, parent corporation of Club Car, Inc.;

Ingersoll-Rand Company, parent corporation of Clark Equipment Company;

Ingersoll-Rand (Barbados) Holding, Incorporated, parent corporation of Ingersoll-Rand Company;

Ingersoll-Rand Global Holding Company, Limited, parent corporation of Ingersoll-Rand (Barbados) Holding, Incorporated;

Ingersoll-Rand Company, Limited, parent corporation of Ingersoll-Rand Global Holding Company, Limited.

No publicly held company owns 10% or more of Club Car, Inc.'s stock.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

The petitioners concede that this case does not present a "difficult, close or intellectually challenging question." Pet. at 22. They do not allege that the Opinion below conflicts with the decision of any other court or that an important question of federal law remains unsettled. Instead, they merely assert that the District Court abused the ample discretion allotted to it by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire, Inc. v. Carmichael*, 526 U.S. 137 (1999). Their argument is only that the courts below based their decisions on erroneous factual findings and misapplied the rule set out in *Daubert*. This issue was fully briefed and argued to the Eleventh Circuit Court of Appeals, which properly followed this Court's guidelines in its Opinion. The petitioners ask for further review of a well-settled issue of law and have not provided sufficient reason for this Court to consider this run-of-the-mill collection case.

STATEMENT

Respondent Club Car, Inc. ("Club Car") manufactures and sells golf cars and golf car parts. Petitioner Club Car (Quebec) Import, Inc. ("CCQ")[1] served as Club Car's

[1] Martin Murphy is president and majority shareholder of CCQ. Although Murphy appears as a petitioner, he did not bring any counterclaims during the proceedings below and had no claims for damages against the respondents. Because the only error enumerated in the Petition involves the exclusion of expert testimony on the issue of

(Continued on following page)

distributor in Quebec from the early 1980's until 2000 when Club Car chose respondent Équipements Pierre Champigny, Ltd. ("EPC") to be its distributor. At that time, CCQ owed Club Car approximately $1.5 million (Canadian) for goods it had received from Club Car for which it had not paid. Record 34-449-63. CCQ never paid what it owed. *Id.* Consequently, Club Car filed suit against CCQ and Murphy on August 29, 2000 to recover the money it was owed, which prompted CCQ to file counterclaims against Club Car, EPC and the president of EPC, respondent Pierre Champigny. CCQ first filed a 60-paragraph, 13-count Counterclaim, followed by a 167-paragraph, 29-count Second Counterclaim. Record 3-44; Record 7-65. Ultimately, it filed an Amended Counterclaim Complaint containing 323 paragraphs and 80 counts. Record 9-117. The parties engaged in an extended period of briefing and discovery, and the case was eventually set for trial in early 2003.

One week before trial, CCQ filed a Motion to Amend the Pretrial Order, which reduced its 80-count Amended Counterclaim Complaint to just seven counterclaims. Record 24-337. One of these was dismissed at the pre-trial conference, leaving CCQ with six counterclaims total, only four of which applied to Club Car: breach of contract, conspiracy to breach a contract, breach of fiduciary duty and promissory estoppel. Pet. 4.

Trial of the case began on February 10, 2003 and lasted five days. Although CCQ had denied any liability to Club Car in its Answer and throughout discovery, it

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damages, Murphy is not properly a party to this appeal, and all proceedings against him in the United States are now final.

conceded at trial that it owed Club Car at least $1,437,544 (Canadian) for unpaid goods. Record 38-451-233. At the close of Club Car's evidence, CCQ proceeded to present its counterclaims to the jury. It contended that its distributor agreement with Club Car prevented Club Car from selling product directly to independent dealers who were not Club Car distributors. Record 39-452-241-42. Club Car responded that its contract with CCQ was nonexclusive. Record 39-452-229. CCQ also alleged that Club Car employees had reached an illicit agreement with respondent Champigny to replace CCQ as Club Car's distributor. Champigny and the Club Car employees denied the existence of such an agreement. Record 37-450-246-47; Record 38-451-56. CCQ presented evidence related to its counterclaims for promissory estoppel and breach of fiduciary duty. It then called Peter Ryan to give expert testimony regarding its alleged damages. App. 1-103.[2]

Ryan had filed a "Preliminary Report" on April 22, 2002, which stated that CCQ had sustained $2,728,583 (Canadian) in damages. Depo. of Peter Ryan 6/03/02, 51-52 and Depo. Exh. 215. Club Car then deposed Ryan in Canada on May 9, 2002. He walked out of the deposition after three hours. Depo. of Peter Ryan 5/09/02 at 124-25, 127. Club Car eventually returned to Canada to complete

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[2] CCQ includes excerpts of Ryan's testimony in the Appendix to its Petition. However, these excerpts are so incomplete that they are misleading. They omit crucial portions of Ryan's testimony and important rulings by the District Court. For instance, CCQ omits the District Court's decision not to exclude Ryan based on his qualifications and its jury instruction regarding Ryan's testimony. For this reason, Club Car has attached as its own Appendix all of Ryan's trial testimony and the entirety of the District Court's trial hearing on that testimony. Throughout this Brief, Club Car's Appendix is cited as "App.," and CCQ's Appendix is cited as "Pet. App."

the deposition a month later on June 6, 2002. EPC and Champigny never had the opportunity to depose Ryan because they had not yet filed their responsive pleadings when Ryan was deposed. On July 11, 2002, a month after Ryan's deposition was completed, CCQ submitted a "Revised Preliminary Report of Peter Ryan" increasing his damages estimate to $9,087,399 (Canadian). After discovery closed, Ryan produced a third report which calculated CCQ's alleged damages at $10,464,176 (Canadian). Record 39-345-33. At trial, Ryan attempted to revise his opinion for a fourth time and present yet another damages figure. App. 27.

Ryan has been a close friend of petitioner Murphy for more than 35 years. App. 57. In fact, they are the best of friends. App. 59. He is the godfather of Murphy's daughter, and he and Murphy are golfing and curling buddies. App. 57-58. Ryan has vacationed with Murphy in Europe, Cape Cod, Las Vegas and Canada's Laurentian Mountains. App. 58. He served as CCQ's "litigation advisor" and gave Murphy advice on legal documents related to the lawsuit. App. 59, 64. He also served as a financial and business advisor regarding CCQ's transferring its assets to another corporation after Club Car filed this suit against CCQ. App. 62-63. Before the case began, Ryan attended several meetings between Murphy and representatives of Club Car. App. 59-60. In addition to his expert testimony, he gave factual testimony at trial regarding these meetings.

At the commencement of Ryan's testimony, the respondents objected that he was unqualified to offer opinion testimony regarding CCQ's alleged damages. App. 12. The respondents urged the District Court to exercise its gatekeeper function and exclude Ryan's testimony. App. 3.

The District Court then permitted counsel for EPC and Champigny to *voir dire* Ryan regarding his qualifications. App. 7-12.

Ryan testified that he had worked in accounting from 1966 to 1971 and became a chartered accountant in 1970. App. 5. However, he had not worked as a full-time chartered accountant for twenty years. App. 10. From 1981 to 1994, he worked in the film industry, supervising or dealing with production partners on such films as "A Savage Place," "Judas Goat" and "Prom Night III." App. 65-66. Since 1994, he had worked as a consultant. Ryan had never published anything in his purported area of expertise. App. 7. He had never testified as an expert before and had never done a study of economic damages in a business loss case before. App. 9. This was his first experience with such an exercise. *Id.*

CCQ was also given a chance to explore Ryan's qualifications. App. 4-6. The District Court then heard arguments outside the presence of the jury on the propriety of Ryan testifying. App. 13-15. In the Petition, CCQ claims that Ryan was not permitted to testify because he had never served as an expert before. Pet. 21. This allegation is simply not true. In fact, the District Court allowed Ryan to testify despite his marginal qualifications and lack of experience. Club Car, EPC and Champigny all objected to Ryan as unqualified, but the District Court held, "I am going to let him testify over your objection." App. 14.

Ryan testified that CCQ had suffered damages classified in eight separate categories. App. 22. Although CCQ now contends that no future damages were argued to the jury, Ryan's testimony specifically described damages for

lost golf car sales and golf car parts sales for the years 2002 to 2005. *Id.* On cross-examination Ryan reiterated that his calculations included future damages:

> Q: Now in your summary and conclusion there in your report, you are calculating damages three, four, five years into the future, aren't you?
>
> A: Yes.

App. 79. Moreover, in its closing argument, CCQ returned to the issue of future damages:

> There are two claims that Club Car (Quebec) has in this case. There are two sets of claims. And the claims really have a dividing line in the year 2000. There are a series of events that occur before the year 2000, and there are a series of events that occur after 2000.

App. 114. CCQ sought future lost profits as its damages for the events arising after 2000, when its distributor relationship with Club Car ended.

Although CCQ's net income for the years 1992 to 1999 *combined* totaled only $193,037 (Canadian), it was Ryan's opinion that CCQ had suffered damages in the form of lost profits and sales amounting to $10,464,176. App. 77-78. Ryan admitted that some of his extrapolations were based upon "gut instinct." App. 72-73. Some of his figures were "a shot in the dark." App. 73. Moreover, during direct examination, Ryan testified that his lost profit calculations were based on gross sales and gross profit numbers and did not account for expenses. For instance, he calculated lost profits on the sale of one-year old golf cars by applying a "gross margin on the sale of one year old cars" to an estimate of the number of cars he felt CCQ should have

sold. App. 28. He also calculated lost profits for sales of packages of golf car parts using a gross profit margin. He testified, "I calculated the cost of these parts by reference to the pricing manual from Club Car, and then applied the gross profit on a per package basis to the number of packages that I previously calculated." App. 29. On cross-examination, Ryan again admitted to using gross profit figures:

> Q: Mr. Ryan, the numbers you have already given the jury and the eight items you talked about are all gross sales and gross profit numbers, weren't they sir?
>
> A: Yes.
>
> Q: They did not consider that the business, in generating those sales and in generating those profits, would have any expenses whatsoever, did they, sir?
>
> A: No.

App. 83. For example, Ryan assumed that CCQ had lost $5 million in sales on new golf cars and that the entire value of those sales would have been booked as profits to CCQ's bank account. App. 84. He assumed that these extra sales would be generated without a corresponding increase in sales force and did not account for any overhead expenses related to those sales. *Id.*

> Q: [The business] is going to put that $5 million directly into its pocket or its bank account without having to account for any expenses related to that $5 million; isn't that right?
>
> A: That's what's in my report, yes.

Id.

Ryan then agreed that lost earnings should be measured net of cost. App. 87. He admitted that, in the real world, increased sales would come only with incremental and administrative costs. App. 88. CCQ's annual financial statements were entered into evidence, and Ryan admitted that the figures in those statements were arrived at by applying generally accepted accounting principles. App. 50-51. Those statements take into account a number of "operating expenses" including: delivery costs, depreciation, interest, salaries, taxes, telephone services and travel. Club Car's Trial Exh. 108, p. 4. Ryan's damages testimony did not account for any such expenses.

Ryan also conceded that he had not subtracted from his calculations revenue that CCQ would have generated despite any deleterious actions by Club Car and EPC. App. 96. He merely calculated CCQ's gross profit. App. 87. Nor did he discount his future damages calculations to present value. App. 86.

CCQ contends that Ryan testified that any incremental expenses would be insignificant and that he explained his failure to account for expenses in his lost profits calculations. Pet. 7. This is not the case. The transcript citations provided by CCQ involve Ryan's testimony about CCQ's value should it be sold to EPC, not any calculation of lost profits. Pet. App. 119a; App. 46-47. Ryan testified that in a sale of the business "the amount of incremental administrative expenses would be minimal." Pet. App. 122a; App. 96-97. This statement is unrelated to his prior testimony that increased product sales would be accompanied by increased costs.

After Ryan testified on direct examination, he was cross-examined by counsel for Club Car and counsel for

EPC and Champigny. App. 57-94. CCQ then had the opportunity to rehabilitate Ryan's testimony on redirect examination. App. 94-102. The respondents then renewed their objection to Ryan's damages testimony. App. 102. The District Court deferred the issue until the close of all evidence, at which time it convened a hearing to consider Ryan's testimony. App. 104-112.

The respondents' objection was based primarily on the fact that Ryan's testimony included only gross profits and gross sales figures. App. 104. The District Court gave CCQ an opportunity to respond to the objection, asking, "What do you say to that? What is the value of his testimony when he does not take into consideration the costs?" *Id.* It noted that Ryan "clearly said that he did not take into consideration the expenses in making his or giving his opinion as to what was lost." *Id.* When counsel for CCQ pointed out that no counter expert had testified to denigrate Ryan's opinion, the District Court responded, "He did it himself." App. 106. The District Court also stated that it was a matter of "sheer common sense" that Ryan should have accounted for costs when calculating lost profits. App. 105. After hearing arguments from all parties on the issue, the District Court eventually determined that Ryan had destroyed the validity of his opinion "by his own testimony." App. 109.

CCQ has represented to this Court that the District Court "struck Ryan's expert opinion evidence on damages *in its entirety*." Pet. 13 (emphasis in original). In reality, the District Court's ruling was much narrower. The District Court instructed the jury as follows:

> Members of the jury, with respect to Mr. Ryan's testimony as to damages, when he says that he

> did not take into consideration the expenses involved and merely used the gross amount, his opinion as to the loss on the defendant's counterclaim is stricken. You are not to consider that.

App. 113. The instruction clearly excludes only "Ryan's testimony as to damages, when he says that he did not take into consideration the expenses involved." The jury remained free to consider any of Ryan's damages figures that were properly calculated.

The jury deliberated from 11:15 a.m. until 8:53 p.m. on February 14, 2003. Record 41-453-61, 68. In its verdict the jury awarded Club Car $1,557,360 (Canadian) against CCQ and Murphy. Pet. App. 80a. It awarded CCQ $100,000 (Canadian) on its counterclaims against Club Car and nothing on its counterclaims against EPC and Champigny. Pet. App. 81a.

The petitioners then filed a "Motion for Judgment as a Matter of Law," a "Combined Rule 50 and 59 Motion" and a "Memorandum in Support of Motions Under Rule 50 and 59." Record 29-434; Record 29-435; Record 29-436. The District Court held a hearing to consider these post-trial motions on March 12, 2003. Record 42-461. The issue of Ryan's testimony was discussed at length during the hearing.

The District Court then entered an Order denying the petitioners' post-trial motions. Pet. App. 17a-79a. Although the bulk of the Order was devoted to other issues raised post-trial by the petitioners, it also addressed Ryan's testimony at some length. Pet. App. 52a-58a. The District Court noted that Ryan's final damages figure and the damage totals combined to reach that figure were biased by Ryan's failure to include incremental costs incurred in

generating revenue, as well as his failure to discount the figures to present value. Pet. App. 54a. It then elaborated on its trial ruling:

> The Court determined from the evidence before it that Ryan's procedures for calculating CCQ's past and projected future profit margins were insufficient according to rudimentary accounting standards, and that his testimony regarding such margins would only serve to confuse the jury. The Court did not need the aid of an opposing expert to recognize the deceptive nature of Ryan's methodology and its lack of conformity with generally accepted accounting principles. Indeed, as the Court expressed at trial, it is a matter of "common sense" that a party's profit margin will be affected by such things as incremental costs and that a party's damages should be reduced by revenue it would generate regardless of an opposing party's fault and adjusted for inflation.

Pet. App. 57a-58a. The District Court explained that Ryan's testimony was excluded because it was misleading and departed from traditional norms of calculating damages. Pet. App. 58a.

REASONS FOR DENYING THE PETITION

I. THE PETITIONERS DID NOT COMPLY WITH SUPREME COURT RULE 29.3.

This Court's Rule 29.3 requires the petitioners to serve their Petition on the respondents "at or before the time of filing." The Petition was filed with this Court on September 27, 2004, and the petitioners' Certificate of Service indicates that the Petition was served on September 27, 2004.

App. 115-116. However, the envelope received by respondent Club Car one week later containing its service copies of the Petition was not postmarked until September 29, 2004, two days after the Petition was filed. App. 117. Because the Petition was not postmarked "at or before the time of filing," respondent Club Car was not properly served in accordance with Rule 29.3. For this reason, the Petition for Certiorari should be denied.

II. THERE WAS NO *EX PARTE* COMMUNICATION BETWEEN THE RESPONDENTS AND THE DISTRICT COURT.

In the Petition, CCQ charges that the respondents engaged in an *ex parte* communication with the District Court. Pet. 13. This allegation is untrue, and Club Car strongly denies engaging in *ex parte* communications or any other unethical behavior at any time. Indeed, the activity CCQ inaccurately characterizes as an *ex parte* communication and attributes to Club Car was not undertaken by Club Car, but by EPC and Champigny. In any event, the activity was completely ethical and not *ex parte* in nature.

Before the District Court heard argument on the admissibility of Ryan's testimony, counsel for EPC and Champigny placed a photocopied page from the Federal Reference Manual on Scientific Evidence on Club Car's and CCQ's counsel tables. He also handed a copy of the document to the Clerk. He later made reference to the document during the hearing. This was not an *ex parte* communication, but merely a routine submission of authority to the District Court that was in no way improper. The District Court addressed the issue, among others, at a post-trial hearing held March 12, 2003. At that time, counsel for EPC and Champigny stated that he had

submitted copies of the document to the Clerk, to Club Car and to CCQ. Record 42-461-17. Counsel for Club Car affirmed that he had seen the document placed on CCQ's counsel table. Record 42-461-23. Counsel for CCQ accepted these statements, and the issue was closed. Record 42-461-18.

Moreover, the document formed no basis for the District Court's *Daubert* ruling. At trial, the District Court made it clear that it had not considered the document.

> MR. PENN [Counsel for CCQ]: If I may say something? This is the first time we have seen this document, and I want to let you know and put it on the record that this was misrepresented by Mr. Purcell. It does not say what he says it did. It's from a reference guide.
>
> THE COURT: I cannot help that. *I have not read it.*

App. 113 (emphasis added). The District Court reiterated that it had "never looked at or considered the document" in its Order of May 14, 2003. Pet. App. 62a. Although CCQ neglects to mention this fact in its Petition, the Court of Appeals considered it in its Opinion. "The excerpt was not 'evidence' but legal authority in support of EPC's argument. Moreover, the trial court indicated it had not even seen the excerpt when it made its ruling." *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 781 (11th Cir. 2004), *reh'g and reh'g en banc denied*, ___ F.3d ___ (11th Cir. June 29, 2004). CCQ can demonstrate no error and is not entitled to further review of this issue.

III. NONE OF THE ARGUMENTS ADVANCED BY THE PETITIONERS SHOW THAT CERTIORARI IS APPROPRIATE IN THIS CASE.

All the Petition seeks is a ruling from this Court that the District Court abused its discretion – nothing more. Pet. 22. CCQ does not argue that the District Court or the Court of Appeals applied the wrong rule of law in the proceedings below. It does not argue that the Opinion of the Court of Appeals conflicts with a decision from this Court, any other court of appeals or any other court anywhere. Instead, CCQ merely contends that the courts below failed to properly apply the law to the facts of the case. Pet. 11, 19. The Petition, however, either ignores or distorts the very facts on which it seeks review. In fact, both the District Court and the Eleventh Circuit Court of Appeals properly applied the law to the facts set out above and properly excluded Ryan's damages testimony because it was unreliable, misleading and based on the worst of methods.

The law governing the admission or exclusion of Ryan's testimony has been clearly delineated by this Court in a trilogy of well-known cases, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire, Inc. v. Carmichael*, 526 U.S. 137 (1999). These cases hold that expert testimony must be reliable and supported by valid reasoning or methodology. *Daubert*, 509 U.S. at 579. Evidence which is not so supported must be excluded.

The *Daubert* trilogy makes two points abundantly clear. First, a district court must be assured that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. Such assurance is necessary to justify the wide latitude given to testifying

expert witnesses. *Id.* at 592. Thus, when expert testimony is called into question, "the trial judge *must* determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline." *Kumho Tire*, 526 U.S. at 149 (emphasis added, internal punctuation and citation omitted). The duty to screen expert evidence is the district court's "gatekeeper" function, and a judge cannot be excused from performing it. *Joiner*, 522 U.S. at 148 (Breyer, J. concurring).

Second, although the district courts must exercise their gatekeeper function, they have great discretion in how they choose to do so. This Court has emphasized the flexibility that the district courts enjoy when performing their gatekeeping role. *Daubert*, 509 U.S. at 594; *Kumho Tire*, 526 U.S. at 141. "The trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire*, 526 U.S. at 152. Evidentiary decisions made under *Daubert* are reviewed only for an abuse of discretion, and deference to the trial court is the hallmark of that review. *Joiner*, 522 U.S. at 143. The law grants the trial court "broad latitude" when it decides how to determine the reliability of expert testimony. *Kumho Tire*, 526 U.S. at 142. Using its discretion, a trial court may properly consider issues of judicial economy and conduct its gatekeeper inquiry in such a way as to avoid unnecessary proceedings and unjustifiable expense and delay. *Id.* at 152.

In this case, the Court of Appeals followed the law outlined above in its Opinion. It correctly noted that expert testimony should be admitted if (1) the expert is qualified to testify on the topic at issue, (2) the methodology relied on by the expert is sufficiently reliable and (3)

the testimony will assist the trier of fact. *Club Car*, 362 F.3d at 780; *see also*, Federal Rule of Evidence 702. Conversely, expert testimony based on unreliable or invalid methodology must be excluded. *Club Car*, 362 F.3d at 780; *see also*, *Daubert* 509 U.S. at 592. The Court of Appeals also noted that the trial court must screen expert testimony to determine if it is relevant and reliable. *Club Car*, 362 F.3d at 780; *see also*, *Daubert*, 509 U.S. at 589. Finally, the Court of Appeals applied the correct abuse of discretion standard to its review of the District Court's ruling. *Club Car*, 362 F.3d at 780; *see also*, *Joiner*, 522 U.S. at 143.

The Court of Appeals held that the District Court had not abused its discretion because Ryan's lost profit calculations were based on flawed methodology. *Club Car*, 362 F.3d at 780. This determination was specifically based on Ryan's admission that he had not factored in expenses and that his estimates were based on gross sales and gross profit figures. *Id.* The Court of Appeals also held that Ryan's testimony failed to comply with Georgia's common law of damages. *Id.* To recover lost profits in Georgia, "[O]ne must show the probable gain with great specificity as well as expenses incurred in realizing such profits. In short, the gross amount minus expenses equals the amount of recovery."[3] *Shaw v. Ruiz*, 207 Ga. App. 299, 304, 428 S.E.2d 98, 103 (1993); *see also*, *Club Car*, 362 F.3d at 780. Ryan's testimony failed to meet this standard. Finally, the Court of Appeals noted that the District Court made its ruling on Ryan's testimony after extensive *voir dire*,

[3] Georgia law governs the determination of damages because this is a diversity case arising in Georgia. *Complete Concepts, Ltd. v. General Handbag Corp.*, 880 F.2d 382, 389 (11th Cir. 1989).

cross-examination and argument on the issue. *Club Car*, 362 F.3d at 780. Based on these facts, the Court of Appeals held that the District Court "adequately developed the record necessary to exercise sound discretion, and did not err in holding the *Daubert* hearing during trial." *Id.*

CCQ now asks this Court to perform exactly the same review previously conducted by the Court of Appeals. There is no need for this Court to engage in such an exercise, which would be redundant and would not change the result reached below. CCQ alleges that the District Court's decision was based on irrelevant factors. Pet. 11. In support of this allegation, CCQ asserts that it made no claims for future damages against Club Car at trial and that Ryan's damages testimony was stricken in its entirety. Pet. 11, 13. As explained above, both contentions are untrue. Ryan presented damages testimony regarding lost profits for the years 2002 to 2005, and counsel for CCQ referred to these future injuries during his closing argument. App. 22, 79, 114. The District Court did not strike the entirety of Ryan's damages testimony, but only that testimony that "did not take into consideration the expenses involved." App. 113. Moreover, CCQ's Petition ignores the principal reason why Ryan's testimony was excluded: his failure to account for expenses when computing lost profits. The District Court and the Court of Appeals made it clear that this failure is what destroyed the validity of Ryan's testimony. App. 109; *Club Car*, 362 F.3d 780. Further review by this Court will not change this underlying flaw.

CCQ suggests that the Court of Appeals somehow acted contrary to this Court's opinion in *Bazemore v. Friday*, 478 U.S. 400 (1986). *Bazemore*, however, is in no way relevant to the case at hand. While this case involves

an expert witness whose damages testimony in a breach of contract case was stricken for his failure to include expenses when calculating lost profits, *Bazemore* involved an expert witness in a Title VII discrimination case who used multiple regression analysis to determine that certain employees were unfairly paid less than others. *Id.* at 398-99. Considering the issue, this Court held that a regression analysis need not incorporate every conceivable relevant variable to be admissible as expert testimony. *Id.* at 400. It made no determination related to computing lost profits.

The differences between *Bazemore* and the case at hand are manifest. The *Bazemore* expert offered testimony comparing salary levels between similarly situated employees. *Id.* at 399. Ryan offered testimony regarding lost profit damages. In *Bazemore*, the expert used multiple regression analysis to reach his opinion. *Id.* at 398. Ryan used a much less reliable technique by applying a gross margin figure to the number of lost sales he estimated CCQ had incurred. App. 83. The evidence in *Bazemore* was offered to prove liability and made no mention of lost profit damages. *Id.* at 398. The disputed evidence in this case was offered solely to prove damages. Moreover, *Bazemore* was decided seven years before *Daubert*, which indisputably controls this case. In short, the holding in *Bazemore* has no bearing on the case at hand.

CCQ also asserts that certiorari should be granted because the District Court lacked a proper evidentiary foundation to make its ruling. Pet. 15. CCQ states that no opposing expert was offered to discredit Ryan's testimony and claims that there was no basis to support the District Court's ruling. Pet. 16. This is nothing more than a claim that the District Court made erroneous factual findings

and is not a basis on which certiorari should be granted. Supreme Court Rule 10. Moreover, CCQ has produced absolutely no authority showing that the respondents had to offer an opposing "rebuttal" expert. Indeed, such a broad requirement would interfere with the flexible, case-specific inquiry mandated by the *Daubert* trilogy.

More importantly, CCQ's argument ignores the fact that Ryan's own testimony provided ample evidence for the District Court's ruling. Ryan testified that although his damages calculations failed to consider costs, such costs would need to be accounted for in the real world. App. 88. He also admitted that CCQ's financial statements, which did include costs, were created using generally accepted accounting principles. App. 50-51. As the District Court noted, Ryan destroyed the validity of his testimony himself, and no outside expert or additional evidence was needed to discredit him. App. 106. CCQ does not dispute that it had the burden of laying a proper foundation for the admission of its expert testimony. *See Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999). It failed to do so, and that portion of Ryan's testimony was properly stricken.

CCQ also complains that the factors justifying the District Court's ruling were not identified until after the trial. Pet. 18. CCQ did not raise this issue in the Court of Appeals below and consequently failed to preserve it for this Court's review. Moreover, its allegations are simply not true. As described above, Ryan's failure to deduct costs when calculating lost profits was identified and discussed at length at trial. It was the basis for the respondents' *Daubert* objection and the main reason why the District Court struck Ryan's testimony. App. 104, 113. Indeed, the District Court only struck Ryan's damages testimony

"when he says that he did not take into consideration the expenses involved and merely used the gross amount." App. 113. This instruction highlights the principal flaw in Ryan's methodology – his failure to account for costs. Ryan's failure to subtract from his calculations revenue that CCQ would have generated despite any deleterious actions by the respondents and to discount his future damages calculations to present value were also explained at trial. App. 86, 96.

The District Court detailed its trial ruling in response to the petitioners' post-trial motions, which sought a new trial in part based on the exclusion of Ryan's testimony. However, the District Court did not offer "after the fact" rationales for its ruling as claimed by CCQ. Pet. 19. It merely reiterated the evidence that had been presented at trial and repeated its ruling. Pet. App. 52a-58a. CCQ only complains that the District Court ruled on the post-trial motions before it.

CCQ next asserts that the respondents' *Daubert* motion was untimely. This issue was fully considered by the Court of Appeals, which held that "a trial court has broad discretion in determining how to perform its gatekeeper function, and nothing prohibits it from hearing a *Daubert* motion during trial." *Club Car*, 362 F.3d at 780. This holding follows this Court's decision in *Kumho Tire*, which stated:

> The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or *when* special briefing or other proceedings are needed . . . as it enjoys when it decides whether or not that expert's relevant testimony is admissible.

Kumho Tire, 526 U.S. at 152 (emphasis added). The District Court's decision was also consistent with this Court's decree that a *Daubert* review is mandatory and cannot be avoided. *Id.* at 149.

CCQ does not assert that every *Daubert* motion brought at trial is *per se* untimely. Instead, it concedes that such challenges are appropriate, at least in certain "rare circumstances." Pet. 20. In fact, the case on which CCQ asks this Court to rely specifically holds that a district court has discretion to consider a *Daubert* challenge raised "on a motion in limine, on an objection during trial, or on a post-trial motion. . . ." *Goebel v. Denver & Rio Grande Western R.R.*, 215 F.3d 1083, 1087 (10th Cir. 2000). In short, CCQ simply asks this Court to second-guess the Court of Appeals and reconsider whether the facts in this case allowed for a *Daubert* challenge at trial.

The District Court expressed some concern about the timing of the respondents' *Daubert* challenge. App. 3. However, it eventually decided to strike Ryan's lost profits damages testimony because that testimony was worthless. App. 108-109. The Court of Appeals considered the issue and determined that there was an adequately developed record to support the District Court's ruling. *Club Car*, 362 F.3d at 781. CCQ has pointed to no conflict among the Circuits on the issue. It merely contends that the District Court abused its discretion in this particular case. There is no need for further review.

Finally, CCQ seeks certiorari because it claims Ryan's testimony was excluded based on the fact that he had never served as an expert witness before. As explained above, there is no factual basis to support this claim. Although the respondents objected to Ryan as unqualified, the

District Court held, "I am going to let him testify over your objection." App. 14. In fact, Ryan's testimony was excluded because his lost profits calculations were misleading and unhelpful to the jury.

At trial, the respondents and the petitioners were allowed to *voir dire* Ryan regarding his qualifications. App. 4-14. Ryan then testified at length on direct examination about his damages estimates and the methodology underlying his calculations. App. 15-57. His figures and methodology were subject to extensive cross-examination. App. 57-94. CCQ had the opportunity to rehabilitate Ryan's testimony on redirect examination. App. 94-103. The District Court then held a hearing outside the presence of the jury before it concluded that Ryan's testimony was inadmissible. App. 104-112. The petitioners filed lengthy post-trial motions which included argument on Ryan's testimony, and were afforded a post-trial hearing on the issue before the District Court decided to uphold its ruling excluding the disputed testimony. The Court of Appeals was fully briefed and heard oral argument on the merits of the District Court's *Daubert* ruling before it upheld that ruling in a unanimous opinion. It then considered and declined CCQ's application for rehearing *en banc*.

Throughout these proceedings, the respondents have explained that Ryan's failure to account for costs and expenses when computing lost profit damages rendered his expert testimony on that issue inadmissable. His methodology was contrary to rudimentary accounting standards, the common law of Georgia and common sense. Instead of explaining why Ryan's opinion should have been admitted or attempting to justify his failure to account for costs, CCQ has responded by raising a variety of specious arguments regarding the procedure by which Ryan's

testimony was excluded. What CCQ has not done, indeed what it cannot do, is explain how any additional procedure would have benefitted it. Ryan's testimony was and remains flawed, and none of the procedural remedies sought by CCQ would make that testimony acceptable.

In this regard, CCQ resembles the respondent in *Joiner*, who sought to offer expert testimony, based on animal studies, that certain chemicals had contributed to his cancer. *Joiner*, 522 U.S. at 144. When scientific flaws in this testimony were pointed out, Joiner failed to explain how or why the experts' opinions were valid, but instead "chose to proceed as if the only issue was whether animal studies can ever be a proper foundation for an expert's opinion." *Id.* In the same way, instead of attempting to demonstrate that Ryan's failure to account for costs when computing profits was proper, CCQ has chosen to proceed as if the only issue was whether a counter expert should have testified and whether the objection was timely. The methodological flaws in the testimony at issue in *Joiner* required that testimony to be stricken, and the methodological flaws in Ryan's testimony in this case required it to be stricken. *Id.* at 146.

The *Daubert* trilogy requires expert witnesses to "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. Ryan as much as admitted that he failed to meet this standard when he testified that in the real world, increased sales profits of any sort come with associated "incremental costs." App. 88. To be acceptable, his lost profit calculations should have accounted for those costs. In a slightly different context, this Court has recognized that "parties relying on expert evidence have had notice of the exacting

standards of reliability such evidence must meet." *Weisgram v. Marley Co.*, 528 U.S. 440, 456 (2000). Ryan's testimony failed to meet those standards. This Court has also explained that "[i]t is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail." *Id.* CCQ knew it needed to produce the best evidence possible to support its position. That evidence was defective and was properly excluded.

This Court has repeatedly emphasized the discretion and flexibility given to district courts asked to review the admissibility of expert testimony. *Kumho Tire*, 526 U.S. at 141. It has declared itself "confident that federal judges possess the capacity to undertake this review." *Daubert*, 509 U.S. at 593. CCQ acknowledges the inherent discretion that district courts have in this area and eloquently explains its purpose. "The reason *Daubert* has remained a flexible inquiry is so that courts can tailor their procedures and substantive inquiries to the facts and issues in the whole spectrum of cases that come before them." Pet. 21-22. CCQ also admits that this Court generally "should not tamper with that flexibility." Pet. 22. However, that is precisely what CCQ seeks to do in this case. Its Petition asks the Court to reexamine the factual findings underlying the District Court's evidentiary rulings and to reconsider whether the District Court abused its discretion in applying the law to those facts. This would convert the *Daubert* trilogy into a tetralogy, with the fourth case effectively overturning the holdings in *Daubert*, *Joiner* and *Kumho Tire* that the manner and method of the *Daubert* inquiry is best left in the hands of the District Court.

CONCLUSION

Ryan was hired by CCQ to calculate its alleged lost profits. He admitted that his calculations included only gross amounts. He further admitted what any layperson knows – that proper lost profit calculations would have accounted for expenses as well as income. His spurious calculations were properly excluded at trial under *Daubert*.

For these reasons and for the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CLUB CAR, INC.,	: Case No. CV100-195
Plaintiff,	:
vs.	:
CLUB CAR (QUEBEC) IMPORT INC. and MARTIN MURPHY,	:
Defendants.	:
* * * * * * * * * * * * * * * * * * *	:
CLUB CAR (QUEBEC) IMPORT, INC.	:
Counterclaim Plaintiff,	:
vs.	:
CLUB CAR, INC.; PIERRE CHAMPIGNY; and EQUIPEMENTS PIERRE CHAMPIGNY, LTD.,	:
Counterclaim Defendants.	: Augusta, Georgia : February 13, 2003

VOLUME 4
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE ANTHONY A. ALAIMO
United States District Judge and a Jury

* * *

[IV-12] Q And do you remember this language being in the website back in the late '90s?

A I believe so, yes.

Q Now yesterday, Mr. Ellington asked you if you would have bought all of the used cars if you had had the same deal as Champigny, and you said, "You betcha."

My question to you is: Were you offered the same deal as Mr. Champigny – ever?

A That's the crux of the problem. I wasn't offered the same deal.

MR. PENN: Thank you.

THE COURT: Anything else?

MR. ELLINGTON: Nothing else, Your Honor.

THE COURT: All right. You may stand down, Mr. Murphy.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. HARRIS: Your Honor, we would call Peter Ryan.

MR. ELLINGTON: Your Honor, we have a matter that should be taken up outside of the jury's presence with respect to Mr. Ryan's testimony.

THE COURT: Did you know that Mr. Ryan was going to be called?

MR. ELLINGTON: Not at 9:00 o'clock. We had Mr. Murphy coming in first.

[IV-13] THE COURT: Nevertheless, did you know he was going to be called?

MR. ELLINGTON: We knew he was going to be called this morning.

THE COURT: I wonder why you did not call my attention to that before the jury came in.

MR. ELLINGTON: I apologize, Your Honor, but this is a matter that should be taken up outside the jury's presence.

THE COURT: Well, do you want to come up to sidebar?

(At sidebar on the record)

MR. ELLINGTON: Your Honor, Mr. Ryan is going to be testifying –

THE COURT: I cannot hear you.

MR. ELLINGTON: Your Honor, Mr. Ryan is going to be testifying on behalf of CCQ against the counterclaim co-defendants and offering scientific or expert testimony. We believe the Court should examine its gatekeeper function with respect to Mr. Ryan –

THE COURT: You should have called my attention to it long before this.

MR. HARRIS: Absolutely, long before this.

(End of discussion at sidebar)

THE CLERK: Would you raise your right hand to be [IV-14] sworn?

PETER J. RYAN, DEFENDANT CCQ'S &
MARTIN MURPHY'S WITNESS, SWORN

THE CLERK: You can be seated.

Please state your full name, spell your last, state your residence and occupation.

THE WITNESS: My name is Peter George Ryan, R-Y-A-N. I live in Oakville, Ontario, in Canada.

DIRECT EXAMINATION

BY MR. PENN:

Q Good morning. You have traveled a very long way to be here this morning.

A Yes, I have.

Q Where did you come from?

MR. PURCELL: Your Honor, I'm going object to that. It doesn't matter where he's traveled from.

THE COURT: It really does not. We accommodated you by waiting anyhow. But go ahead.

MR. PENN: I apologize, Your Honor.

BY MR. PENN:

Q If you could, please describe for us your educational background?

A I received my preliminary education in Ontario. I attended University of Windsor in Windsor, Ontario where, I graduated with an Honours, Bachelor of Business.

[IV-15] I then completed the Chartered Accountants program in the Province of Quebec and was admitted to the Institute of Chartered Accountants in Quebec and subsequently in the Province of Ontario.

THE COURT: Would you give us the dates of these things? When did you graduate?

THE WITNESS: I graduated in 1966. I was admitted to the Quebec Institute of Chartered Accountants in 1970 and to the Ontario Accountants in 1986.

MR. PENN:

Q And you mentioned Chartered Accountants. What does Chartered Accountants mean?

A The Institute of Chartered Accountants in Canada would be the equivalent of the certified public accountant in the United States.

Q And can you just briefly go over with us a little bit of your work history?

A I worked for a firm of chartered accountants in the City of Montreal from 1966 to 1971. I was employed by the Canadian Subsidiary, a private Swiss bank, from 1969 to 1973.

I traveled overseas in Europe and Australia from 1973 to 1976.

I returned to work for the Swiss bank on my return to Montreal.

[IV-16] I then worked for a company which was an importer and manufacturer of sporting goods, primarily sporting goods.

And subsequent to that, I worked for a communications and telemedia, a Canadian company.

And then, after moving to Toronto in 1986, I worked with Mr. Paul Boffman managing his personal companies and acquiring companies for him.

Q Do you have experience in evaluating businesses?

A Throughout my business career, I have been involved in several acquisitions on behalf of the parties that I work for. And part of that process would involve analytical work in these evaluations.

THE COURT: Mr. Penn, did you file a CV in this case?

MR. PENN: We did, Your Honor.

THE COURT: You did?

MR. PENN: We did.

THE COURT: All right. Go ahead. I generally handle that aspect of it.

MR. PENN: Okay. I'm sorry. I didn't know that's the procedure.

THE COURT: You know what the rule is. You were notified of that in the pretrial discussion. But nevertheless, go ahead.

MR. PENN: All right. Thank you, sir.

[IV-17] Just to clarify, is my understanding of that to just proceed on and not cover all of his qualifications if the CV has already been filed?

THE COURT: Let me see the CV.

MR. HARRIS: Your Honor, we filed it in Savannah.

THE COURT: You do not have a copy? Well, that is all right. We will find one here.

MR. HARRIS: We do, Your Honor, but I don't think we brought it.

THE COURT: Well, I will ask him some general questions.

Mr. Ryan, you have described your work history since you graduated; have you not?

THE WITNESS: Yes, Your Honor.

THE COURT: Have you published anything in your specialty?

THE WITNESS: No, Your Honor.

THE COURT: Have you appeared as a witness, an expert witness, in any case before?

THE WITNESS: No, Your Honor.

THE COURT: All right. Mr. Ellington, do you desire to voir dire him on his qualifications?

MR. PURCELL: I do, Your Honor.

THE COURT: All right. Go ahead, Mr. Purcell.

MR. PURCELL: Thank you, Your Honor.

[IV-18] VOIR DIRE EXAMINATION

BY MR. PURCELL:

Q Mr. Ryan, you have not been working in the public accounting business, have you?

A As a public accountant?

Q Yes, sir.

A No.

Q You are Mr. Murphy's best friend, aren't you, sir?

A He is a personal friend, yes.

Q And, Mr. Ryan, you, in evaluating this case and the opinions you have reached –

THE COURT: Wait a minute. I just want to go into the qualifications. Do you wish to cross-examine him on that?

MR. PURCELL: I wish, Your Honor, to see what the witness did before the jury hears scientific testimony and expert testimony in this case.

MR. HARRIS: I object. They've had an opportunity to Daubert this witness for six months. Why they chose to do it now, I don't know.

MR. PURCELL: Your Honor, that's not discretionary. The Court must exercise its gatekeeper function before the jury.

MR. HARRIS: But –

MR. PURCELL: May I finish? – before the jury [IV-19] hears scientific evidence. Accounting evidence is well-known scientific evidence. This is –

THE COURT: All I want to do is question his qualifications, if you can.

MR. PURCELL: Yes, sir.

BY MR. PURCELL:

Q So you have never testified as an expert, have you?

A No.

Q You have never been offered as someone who appraised damages in an economic loss case, have you?

A No.

Q You have never studied the area of economic damages and reported any cases of economic damages, have you?

A I'm not clear on the question.

Q You have never done a study of economic damages on a business loss case and reported on that before, have you?

A Before this, no.

Q As a matter of fact, this is your very first experience in such an exercise, isn't it?

A Yes.

Q And you have never, in your entire career, been engaged in the business of public accounting, even though

you are a chartered accountant in Canada; isn't that right, sir?

A No.

Q Isn't it –

[IV-20] A No, that's not right.

Q You, for the past twenty years, you haven't been a public accountant, have you?

A I have not been full-time employed in the practice of public accounting.

Q In fact, the financial statements, which are here, I believe, in evidence, were not financial statements of this business that you prepared, were they?

A I couldn't answer that without some time frames.

Q Mr. Ryan, the financial statements bear on their very face that they were prepared by somebody else; you're not disputing that?

A Some financial statements were prepared by other people, yes.

MR. HARRIS: Your Honor, I would object if he's going to examine him about financial statements.

MR. PURCELL: I'm not –

MR. HARRIS: Financial statements are –

MR. PURCELL: I'm just going into his qualifications.

THE COURT: Go ahead.

MR. PURCELL: Thank you.

BY MR. PURCELL:

Q And the information you gained, Mr. Ryan, was supplied by Mr. Murphy, wasn't it?

[IV-21] A The information that I gained was from my examination of the financial records of Club Car (Quebec) and the other companies involved.

I had been involved as a financial professional all my working career. And the fact that I was not in the practice of public accounting doesn't –

Q Thank you very much, Mr. Ryan, but if you can restrict your answers to the question that was asked, and we can move a little faster.

Mr. Ryan, you were at business meetings as a business advisor helping the Murphys, weren't you.

A Yes, sir.

Q That was your role. We heard the testimony, and I won't belabor that by going through all the meetings.

MR. PURCELL: Excuse me.

(Pause)

MR. PURCELL: That's all I've got on the witness' qualifications at this time, Your Honor.

THE COURT: Mr. Ellington?

MR. ELLINGTON: Nothing in addition to what Mr. Purcell has done.

THE COURT: Do you submit that he is not qualified to give an expert opinion in this case?

MR. ELLINGTON: Yes, Your Honor. That is our position. He is not qualified as an expert for the reasons [IV-22] laid out.

MR. HARRIS: Your Honor, can I respond?

THE COURT: Of course,

MR. HARRIS: He is the – has been the accountant for this company. He has been the financial advisor to this company. There's no one who knows this company better than this man. And he's going to talk about –

THE COURT: You are doing a good bit of testifying. I did not hear all of that from the witness.

The fact of the matter is he indicates that he has never really studied the business of – the subject upon which you have put him up here for.

MR. HARRIS: Your Honor, we think we can lay the foundation that he's –

THE COURT: That's one of the problems here when you have multiple lawyers. Since he put the witness up, I will have him state the objection, if he has any.

MR. PENN: Your Honor, we believe we can lay the foundation for Mr. Ryan's qualifications. And we got cut off right in the middle of the foundation questions.

THE COURT: He already said that he had no experience in that particular field.

MR. PENN: Your Honor, he has testified that he has twenty years experience as a financial accountant, and he has been the accountant for CCQ for 20 years.

[IV-23] THE COURT: Well, he specifically said he had no experience in that field and had never testified before in that field.

I am going to sustain the objection.

MR. PENN: Your Honor, I don't believe – he's not testifying in the field of just public accounting. He's testifying in the field as a financial advisor, financial analyst, as well as his specific experience as an accountant for CCQ over the last twenty years.

THE WITNESS: Your Honor –

THE COURT: Just a minute.

MR. PENN: Your Honor, we would request that the jury be excused so we can have a hearing on this.

THE COURT: All right. Members of the jury, please go to the jury room.

(Jury out at 9:29 a.m.)

MR. PENN: May I continue, Your Honor?

THE COURT: Yes.

MR. PENN: This is an absolute ambush on the morning this witness arrives from Australia to testify in this case. He has been identified as an expert for well over a year and a half. He has been deposed at least twice. They never raised a *Daubert* motion before. This Court gave detailed lines for filing a motion in limine, and they have not filed it.

[IV-24] And then this morning, after interrupting a trip to Australia so he can come to testify, they raise this

issue. He has testified that he has experience valuing businesses.

THE COURT: I heard his testimony, and I stated to you my observations of what he said. He has testified that he is an accountant, a chartered accountant. He said he had no experience whatever in evaluating the type of damages he is claiming to have done in this case.

MR. PENN: Your Honor, that's incorrect. He did not say that. That is not his testimony.

THE COURT: Nevertheless, that is what I heard.

MR. PENN: Your Honor, I would disagree with the Court's conclusion on his testimony. I got interrupted –

THE COURT: Why not ask Mr. Ryan what experience he has with CCQ and the cash flow coming in and out of the business, how the impact of Mr. Champigny's business will affect CCQ, and then the value of its business? He can testify to that. Why not ask Mr. Ryan that?

I think in view of the fact that you, as counsel for Mr. Champigny, and the Plaintiff waited until this moment to object is untimely. He filed whatever his statement was, in accordance with the rules of procedure, as to what he was going to testify to. There was no objection to that up to this point.

[IV-25] And I think, to some extent, counsel is right. I am going to let him testify over your objection.

So bring in the jury. But now, you are limited to whatever statement of his opinion was filed in this case. He is limited to just that kind of testimony and no more.

MR. PENN: Correct, Your Honor.

(Jury in at 9:35 a.m.)

THE COURT: And may I have a copy of that?

MR. PENN: Would you like a copy of his report?

THE COURT: Yes.

MR. PENN: Your Honor, he also has – at Exhibit 147, he has a number of summaries that he has provided that contain all kinds of financial data that he pulled out of the seven boxes that are in the back row back there.

THE COURT: I am not concerned with that. He is limited in his testimony to what you filed here was his opinion.

MR. PENN: Your Honor, the summaries go with his report. That's what I was pointing out.

THE COURT: All right.

MR. PENN: And the summaries are in evidence.

THE COURT: All right.

DIRECT EXAMINATION (Continued)

BY MR. PENN:

Q Mr. Ryan, before we were interrupted, we were [IV-26] discussing your qualifications.

Let's talk about specifically your experience with CCQ. Can you go over that with us, please?

A CCQ was formed on or about 1980. Mr. Murphy asked me if I would be his accountant at that point in time, with the exception of the three-year hiatus when I was overseas from '73 to '76.

And I have been Mr. Murphy's accountant and business adviser in various capacities.

Q And how long a period of time is that again?

A My original involvement with Mr. – with Club Car's business specifically would have started in 1980 to date.

Q And as their accountant, what kinds of things did you do for the company?

A I would meet with the Murphys on a regular basis and review their financial results, assist in the preparation of the financial statements, preparation of income tax returns, et cetera.

We would also meet to discuss the current situation in the Quebec market and competitive situations, anything that might arise in the normal course of business.

Q Okay. Over those twenty years, were you able – or did you have an opportunity to become familiar with the golf cart market in Quebec?

A Yes.

[IV-27] Q And the sales of golf carts?

A In terms of volumes and market share, yes.

Q Did you also perform any analysis of sales figures or any other thing that has to do with the sale of golf cars?

A I would perform an analysis of the financial results for the Murphys on a regular basis.

Q Okay. Did you calculate margins?

A Yes.

Q Did you calculate profits?

A Yes.

Q Did you calculate losses?

A Yes.

Q Did you calculate gross revenue?

A Yes.

Q Sales volumes?

A Yes.

Q Net income?

A Yes.

Q What other kinds of things did you account for?

A In the course of reviewing financial results for a private company and operating company, we would look at all the expenses and costs of doing business, review them on a regular basis.

Q And as the accountant for CCQ, did you have complete and full access to all of their financial information?

[IV-28] A Yes, sir.

Q Did you actually prepare tax returns for the corporation?

A Not in the most recent years. But prior to moving to Toronto and up to about 1990 to '91, yes.

Q Have you ever filed – or prepared financial statements for the corporation?

A Yes.

Q Are there any other aspects of the financial analysis of the business that I have left out that maybe we should go over?

A I have used my thirty odd – thirty-five years experience in working as a financial person to analyze virtually every aspect of the operation of Club Car (Quebec) and any documents that have been provided in connection with this case.

Q And you testified, I believe, earlier that you had experience in the sales of businesses?

A Yes.

Q And as part of that, do you also have to calculate the value of businesses?

A Yes.

Q All right. Have you been retained as an expert witness in this case?

A Yes.

[IV-29] Q As part of that, what were you asked to do?

A I was asked to review the situation and assess the damages involved in this case.

A Okay.

Q And as a part of that, did you have an opportunity to review any information in arriving at your opinions?

A I have spent a considerable amount of time reviewing tens of thousands of pages of documents in this regard.

Q And I alluded to earlier in reference to this, there is a back row there of several boxes.

Do you recognize the boxes?

A I recognize the boxes. They contain the documents that I have reviewed, yes.

Q As a part of your review, or as a result of your review, did you prepare any documents to assist you in deriving your opinions?

A As an ongoing procedure, I prepared a series of accounting spreadsheets and analytical spreadsheets to support my conclusions.

MR. PENN: Bob, if you will put Exhibit 147.

BY MR. PENN:

Q And I want to just go through this quickly. Do you have your summaries with you?

A No, I don't.

MR. PENN: Your Honor, may I approach the witness?

[IV-30] BY MR. PENN:

Q And are those the summaries that you prepared in connection with this case?

A They appear to be, yes.

MR. PENN: Just briefly, Bob –

BY MR. PENN:

Q I'm not going to go through every one of them because how many pages do you have in front of you?

A Probably a hundred and fifty.

Q A hundred and fifty pages. If we just flip a few of the first pages, what kinds of information do we have on these pages?

A This particular document was a work sheet which calculated the market share of the various manufacturers in the Province of Quebec.

MR. PENN: Bob, go to the next page, just through a couple of pages.

BY MR. PENN:

Q This one was the sales history of –

A That is the sales history of Club Car product, again, in the Province of Quebec for the years 1998 to 2000.

Q And go to the next one. What is this one?

A Those would be supporting the previous schedule. Those would be the years of '98, '99, 2000 on an individual basis.

Q Go to the next one. Again, sales history?

[IV-31] A Sales history.

Q And what other types of summaries or charts or information do you have in there?

A I have an analysis of the purchases between Mr. Champigny's company and Club Car International. I have an analysis of the documents produced by Mr. Champigny, being the purchase invoices, the various Customs and import documents relative to the shipping of cars and parts packages.

And anything that varies on my report, in all likelihood, has a supporting schedule of some kind.

Q All right. And do you have a copy of your report? It's not with the summaries.

A No, not with those documents.

MR. PENN: Your Honor, may I approach the witness, again?

BY MR. PENN:

Q Is this a copy of your report?

A Yes, it is.

Q And I don't want to go through the entire report, but I believe at the last page, you have some conclusions.

A Yes.

Q And if you could, just tell us what your conclusions were in the report?

A After a considerable amount of time reviewing not only [IV-32] the documents but the history over the period of time, I concluded that Club Car (Quebec) had suffered damages as a result of the actions of Club Car, Inc. and Equipements Pierre Champigny.

Do you want me to quantify them according to this report?

Q Yes. Go through the different ones that you have in that report.

A As of the date of this report, I had determined that the damages were as follows:

Lost sales on one year old cars in '97 to 2000 in the amount of $821,832.

Damages on parts packages sold to Equipements Pierre Champigny in the amount of $921,435.

Damages as a result of lower margins on new and one year old cars in the amount of $414,986.

Unpaid commissions in U. S. dollars, $201,100.

An amount representing provincial sales tax of $171,064.

The damages resulting from new car sales in 2001 in the amount of $940,384.

Lost sales of new cars for the period of 2002 to 2005 in the amount of $5,463,108.

Profits on parts sales from 2001 to 2005 in the amount of $1,355,229.

[IV-33] The total damages identified in my report at that date are $10,464,176.

Q Okay. Now since that time, have you revised those numbers based on the claims that exist today?

A Some of the damages that I have identified I believe have not been presented as claims in this court. But by and large, those claims which have been presented reflect the numbers in this court.

Q And have – since some of the claims have not been presented, are there revised numbers within that framework of the numbers that you provided earlier?

A There may be minor changes in terms of the number of units or variations of percentage or average selling price, something like that.

Q Let's talk about some of the specific numbers.

MR. PENN: Bob, if you will put up the damages.

BY MR. PENN:

Q Let's talk about how you arrived at these numbers.

One portion is the calculation of damages for the sale of free new parts.

And can you see that, by the way?

A Yes, I can.

Q If you want a copy –

MR. PENN: Your Honor, may I approach?

THE COURT: Yes.

[IV-34] MR. PENN: Thank you.

BY MR. PENN:

Q Under (A), what is this calculation right here?

A During the course of reviewing the documents which were produced, it was discovered that Club Car had been – Club Car, Inc. – had been shipping parts packages to Mr. Champigny with his cars.

That information came – what I did was – Mr. Champigny produced his Customs documents. After a considerable period of time and considerable reduction in the number of documents due to duplication, I prepared a summary.

MR. ELLINGTON: Your Honor, I hate to object, but I'm going to object here because the testimony we're seeing now is brand-new testimony outside of the scope of his expert report. These type of calculations have not been presented here before.

MR. PENN: Actually, it comes right out of his report.

MR. PURCELL: I'm going to object, too, because I have a document that's got a different number on it.

THE COURT: You can cross-examine him on that.

MR. PURCELL: I understood the Court to limit the witness to his report.

THE COURT: Yes, yes.

[IV-35] Point out in the report what you're questioning him about, where in the exhibit it is.

BY MR. PENN:

Q Where does this –

THE COURT: No, no. My question is: Where in the report he filed, where is it?

MR. PENN: Right. That is my question to Mr. Ryan.

THE COURT: All right.

BY MR. PENN:

Q Mr. Ryan, where does this section (A) come from in your report?

A Section (A) refers to, under my summary and conclusions, item two, Damages on Parts Packages.

Q What is the number on your report?

A The number on my report is $921,435.

Q All right. And the number here is a little higher. Can you give an explanation as to why, what is the difference?

MR. PURCELL: Judge, he –

THE COURT: He cannot testify to that. He is limited to this.

MR. PENN: Okay. Thank you, Your Honor.

MR. PURCELL: And we would object to the screen showing the jurors numbers other than what is on the report,

[IV-36] Judge.

MR. ELLINGTON: I have the same objection.

THE COURT: I will sustain the objection.

MR. PENN: May I consult with co-counsel for a second?

THE COURT: Certainly.

(Pause)

BY MR. PENN:

Q Mr. Ryan, the numbers that were on the screen, the total numbers for everything that is in that demonstrative exhibit, are they higher or are they lower than the numbers in your report?

A I would say for all intents and purposes, they are virtually identical. There are minor differences, certainly.

Q You just gave us a total –

THE COURT: Go on to your next question.

MR. PENN: I don't think he understood my question, Your Honor.

THE COURT: Did you understand his question?

THE WITNESS: I'm not sure I did, Your Honor.

THE COURT: All right. Go ahead. Restate the question.

BY MR. PENN:

Q Give us again, what is the total number that was on [IV-37] your report?

A The total number on my report was $10,464,176.

Q And what was the total number for the revised number that came out of your report?

A The total number, based on an extrapolation of my report ranged from $5,395,994 to $5,870,936.

Q So the revised numbers that are based on your report are lower than the numbers that were in your report?

A Yes, they are.

MR. PENN: Your Honor –

THE COURT: Generally speaking, his testimony is limited to what he filed in this Court, or rather the opinion that you filed in this Court.

BY MR. PENN:

Q Okay. Let's go back to your report, Mr. Ryan, and let's talk about the first conclusion.

What was the number again? What was the conclusion and what was the number?

A The conclusion was that the damages on lost sales of one year old cars for the period 1997 to 2000 was $821,813.

Q All right. And that was for the loss of new sales?

A That would have been the gross margin on the sale of one year old cars for that period of time.

Q Okay. And how did you arrive at that calculation?

A After reviewing all the invoices between Club Car, Inc. [IV-38] and Equipements Pierre Champigny and after reviewing the Customs documents, et cetera, from Mr. Champigny, I determined the number of one year old cars that were sold during that period of time and the retail value, and applied a margin to that number.

Q Okay. How many cars did you determine were sold?

A May I refer to the report?

Q Yes.

A There were nine hundred and sixty-three one year old cars during that period of time.

Q And then take us through your calculations. You have nine hundred and sixty-three cars –

A Nine hundred and sixty-three cars. The relative sales volume was $3,742,928. And the margin I used was 20.56 percent.

Q Where did you get the 20.56 percent margin?

A The 20.56 percent was the margin on Club Car (Quebec)'s business in 1997.

Q Is that an average margin?

A That is an average of new and used product, yes.

Q And in applying that calculation, you came up with that number?

A Yes.

Q And go to your second conclusion.

A The second conclusion was the damages on parts packages [IV-39] in the amount of $921,435.

Q How did you calculate that number?

A After reviewing the invoices between Club Car, Inc. and Equipements Pierre Champigny, reviewing the Customs documents, sorting them in a useful format to eliminate duplication, it became clear that, as a regular practice, Club Car was providing parts packages with the shipments of cars.

I determined that it was not possible, based on the information that had been provided, to be absolutely specific about the number of parts packages. But from the review of the documents, it was apparent to me that it was normal and in virtually 100 percent of the cases, I decided to, in the interest of being conservative, to use a factor of 90 percent.

I applied the 90 percent factor to the total number of cars shipped to Pierre Champigny during that period of time.

I determined the value of the parts packages by referring to a Customs document where the Quebec sales tax was actually paid on parts packages.

And I calculated the cost of these parts by reference to the pricing manual from Club Car, and then applied the gross profit on a per package basis to the number of packages that I previously calculated.

Q Did the value of the parts packages, what values did [IV-40] you arrive at?

MR. PURCELL: Objection, foundation.

MR. ELLINGTON: Objection also.

MR. PURCELL: He said it was a wild guess, Judge. He said the documents didn't supply – didn't give him any numbers, so he decided to be conservative and use 90 percent.

MR. ELLINGTON: I so object, Your Honor,

MR. PENN: May I respond, Your Honor?

THE COURT: Of course. You do not have to ask me that question. Go ahead. You have been doing it all along.

MR. PENN: Your Honor, he testified that the 90 percent number he came up with, the factor that he multiplied it by, came from the documents that he got. And that was just one that he didn't have the specific number on.

THE COURT: What did the "wild guess" refer to?

MR. PENN: The 90 percent is what they're saying is a wild guess.

THE COURT: No, I will sustain the objection on that.

I wish to ask him one question. These are Canadian dollars figures; are they not?

THE WITNESS: Yes, they are.

THE COURT: All right.

[IV-41] BY MR. PENN:

Q Mr. Ryan, how did you arrive at the value of a parts package?

A There is a document attached to my report. When goods are imported from the U. S. to Canada, Customs documents are prepared detailing exactly what is crossing the border.

The Customs broker then prepares what is referred to as a commercial invoice. And any amount of taxes and/or duties that is due at that point in time is computed at that point in time.

I located in the documents two invoices from the Customs broker. They indicated that the cost value, on which is the basis of the payment of the tax, was, again, from memory referring to my specific work sheet, in the vicinity of four hundred and sixty some odd dollars.

And I took that parts package and the pricing manual of the parts from Club Car International for Canadian prices and determined what the retail value of that parts package was.

Q What was the retail value?

A The retail vale [sic] was, again, somewhere in the vicinity of nine hundred and seventy-five to two thousand dollars.

Q Based on the retail value and the – I guess the wholesale value that you came up with out of the Customs documents, did you calculate a margin?

[IV-42] A Yes, I did.

Q What would be the amount of the margin?

A The margin would have been the difference between the two.

Q What was the amount?

A Using nine seventy-five and four sixty-eight, the difference would be five hundred and seven dollars in gross profits per package.

Q And you used that number as part of your calculations for the parts packages?

A Yes, sir.

Q What was the total amount of those damages?

MR. PURCELL: I object, Your Honor. He still hasn't testified about the number of parts packages, how that number was reliably arrived at and, in fact, said that there was no reliable evidence in his summary of documents at which he could arrive.

So he decided to be conservative and apply the 90 percent.

MR. ELLINGTON: Same objection, Your Honor.

MR. PENN: May I ask a couple more questions of Mr. Ryan?

THE COURT: Sure. As it is, I am going to sustain the objection, but go ahead.

[IV-43] BY MR. PENN:

Q Mr. Ryan, let's talk about that 90 percent number again. That's on the number of parts packages that Mr. Champigny was getting.

From what documents did you derive that number?

A I derived that number from a summary – excuse me – a summary spreadsheet which I prepared, which listed all the shipments of used cars from Club Car International to Equipements Pierre Champigny for the period in question.

The total number of cars was in excess of two thousand.

Q Okay. And the summary sheets came from documents that were produced by whom in this lawsuit?

A They were produced by Club Car, Inc. and by Equipements Pierre Champigny.

Q So they were not documents provided by CCQ?

A No, they were not.

Q And out of those documents, you created a summary sheet?

A I did.

Q And you determined how many parts packages had been shipped?

MR. PURCELL: I object. That's leading, and that's not the testimony.

THE COURT: I confess, I did not hear the question. Do you want to restate it?

[IV-44] BY MR. PENN:

Q And you found out there were how many parts packages shipped?

THE COURT: What is your objection?

MR. PURCELL: My objection, Your Honor, is he says the document shows his summary. The number of cars, not the number of parts packages shipped. That's my objection. And then he's leading.

THE COURT: The objection is sustained, and do not lead.

MR. PENN: I'm sorry, Your Honor.

BY MR. PENN:

Q How many cars did you determine were shipped?

A In the vicinity of two thousand one hundred.

Q And based on the number of cars that were shipped, did you have invoices for those cars?

A Yes.

Q Did those invoices include anything in addition to the cars?

A No. But when you're reviewing the documents, it is impossible to review the documents in isolation.

When you're importing documents – excuse me – when you are importing materials across the border, there is a package of documents which exist which is the commercial invoice, the Customs declaration. Customs declarations [IV-45] indicated parts packages in some but not all cases.

Q Okay. And based on the documents that you had to review, were you able to arrive at a percentage of the time that Mr. Champigny received parts packages?

A It was my opinion, after reviewing the documents, that there was a regular pattern of providing parts packages with shipments of cars. And where they were not provided at the time the cars were shipped, they were back ordered and shipped at a later date.

Q Okay. And were you able to determine how often or what percentage of time Mr. Champigny received parts with cars?

A I would have to refer again specifically to the spreadsheet that I prepared because the documents –

THE COURT: Is your answer you do not know?

THE WITNESS: No, Your Honor. I can determine – if I'm allow to refer to my spreadsheet where I have been able to identify specifically where parts packages were shipped with various shipments.

THE COURT: You are entitled to look at whatever you have.

BY MR. PENN:

Q Mr. Ryan, are the spreadsheets up there?

A According to the summary, the total number of cars that were shipped in the period in question is two thousand, one hundred and twenty-four. I identified as of the date that [IV-46] this report was prepared parts

packages which matched up with invoices and shipments of one thousand and sixty-four.

But there were a considerable number of back orders and back shipments which I could not identify and match up against a particular shipment.

Q Okay. And based on the review of the documents and the numbers that were provided in your summary, did you calculate a percentage of time that Mr. Champigny received parts packages?

A It was my opinion that the 90 percent would represent a reasonable conclusion.

Q Now did you review – did part of the information that you reviewed, did it include anything else in the case – like testimony?

A I reviewed my own depositions. I reviewed – I'm working from memory. I reviewed depositions, but I can't be absolutely certain which ones I did and did not review.

Q Did you review the deposition of Mr. Champigny?

A Yes, I did.

Q Okay. Let's go to your next – we were just talking about item number two, correct?

A Yes.

Q And the total number for that was nine hundred.

MR. PURCELL: I'm going to object, Your Honor. That's what is based on the 90 percent figure. He has just [IV-47] given us a 50 percent statistical calculation, more or less, that he was able to trace of used car parts packages.

And now he's using, once again, the 90 percent number with no foundation.

MR. ELLINGTON: That is the basis of my objection also, Your Honor.

MR. PENN: Your Honor, we just laid the foundation the he reviewed seven boxes worth of documents, and they were documents produced by Mr. Champigny.

THE COURT: What about his specific objection?

MR. PENN: He said based on his review of the documents and based on his summary – he just read off the numbers – he felt, in his opinion, the percentage of time that Mr. Champigny got parts packages was 90 percent.

MR. PURCELL: Judge, what he said was he found a thousand, sixty-four parts packages on all of the documents he reviewed, out of twenty-one hundred and twenty-four cars that were sold. I'm no mathematician, but that's less than 50 percent.

THE WITNESS: That –

THE COURT: Just a moment.

MR. PURCELL: There is no basis for his conclusion of 90 percent. That's my objection.

MR. PENN: That's not his testimony, first of all. He gave statistical numbers. Then he said there were a [IV-48] number of other documents that he couldn't match with anything that were back ordered parts.

And in addition to that, Your Honor, if they have an objection to that number, that is a matter for cross examination for credibility not admissibility.

THE COURT: All right. Go ahead.

And, members of the jury, you are the exclusive judges of the credibility of the witness. And merely because an expert witness testifies to certain matters as his opinion, you are not bound by that opinion. You may disregard it or give it credit.

So go ahead.

MR. PENN: Thank you, Your Honor.

BY MR. PENN:

Q Again, what was the number of the second one?

A The damages on the parts packages, the amount was $921,435.

Q Let's go down to the third line. And that's damages on lower margins on new and one year old cars sold.

How did you arrive at that calculation?

A Using 1997 as a base year, before the impact of one year old cars in the marketplace, Mr. Murphy and Club Car (Quebec)'s gross margin was twenty point – I think the precise number is five six percent.

By analyzing Club Car (Quebec)'s results for the [IV-49] subsequent three years, I determined that there had been a significant reduction in the margin from 1997. And based on Club Car (Quebec)'s sales volumes for those

years, I determined the dollar value attributable to that reduction margin.

Q What was the dollar value?

A The dollar value in my report is $414,986.

Q Now the fourth item.

MR. ELLINGTON: Your Honor, I'm going to object to the fourth item. That has been ruled on in this case thus far. That was a matter that was ruled on by Your Honor in the late fall and was addressed last week.

MR. PENN: Could we have a sidebar, Your Honor?

THE COURT: I guess so.

(At sidebar on the record)

MR. PENN: Your Honor ruled that these damages, as to Club Car's damages, are part of the tort claims, the interference with the business arrangement.

MR. HARRIS: That was your ruling at the hearing.

THE COURT: Just one of you.

MR. PENN: I'm sorry.

MR. ELLINGTON: He said as to Club Car. They're out as to Club Car. I'll second that.

MR. HARRIS: You didn't ask –

MR. PURCELL: Judge, they are out as to us, as [IV-50] well. If there is not an enforceable contract, they

can't have an interference with a contract. That's not what, under Canadian contract law, is required.

MR. PENN: That's an incorrect statement of Canadian law.

THE COURT: Well, go ahead. I am going to let it go in to the jury.

MR. ELLINGTON: Very well, Your Honor.

MR. PURCELL: We have two minds about it.

MR. ELLINGTON: Let me get my objection on the record.

THE COURT: I beg your pardon?

MR. ELLINGTON: If you are going to let it in, I'm going to object on the record on behalf of Club Car.

MR. PURCELL: And I will, too.

(End of discussion at sidebar)

THE COURT: Go ahead.

BY MR. PENN:

Q Number 4, the unpaid commissions, that was for the hundred dollar (U.S.) commissions for the sale of used cars?

A Yes.

Q And did you calculate those damages?

A Yes, I did.

Q How did you do that?

A By reviewing the documents produced by Mr. Champigny [IV-51] and Club Car International, I determined the number of Club Car cars that had been sold to Mr. Champigny.

THE COURT: When?

THE WITNESS: During the five year period, Your Honor.

BY MR. PENN:

Q Give Your Honor the years. What years?

A That would be 1997 to 2000.

THE COURT: When was the letter of initiation?

MR. ELLINGTON: July 24, 1997, as I recall, Your Honor.

THE COURT: All right. With respect to that, the objection is sustained, because that relationship was terminated by that letter.

MR. PENN: Correct, Your Honor. And the claim is that there was interference with that relationship.

THE COURT: No, sir. The objection is sustained.

MR. PENN: Thank you, Your Honor.

BY MR. PENN:

Q All right. Go down to the fifth item. That was provincial sales tax.

A Correct, yes.

Q Is that also QST?

A QST refers to Quebec sales tax.

Q And what was the number of the damages there?

A [IV-52] I don't recall the specific date, but at that point in time, Club Car, Inc. was deemed to be carrying on business in the Province of Quebec and had a legal obligation.

MR. ELLINGTON: Objection, Your Honor. That calls for a legal conclusion by the witness.

THE COURT: It does.

BY MR. PENN:

Q Just tell us what the number is.

THE COURT: The objection is sustained.

THE WITNESS: The number is $171,064.

MR. ELLINGTON: Your Honor, I'm going to object to that number. There is absolutely no foundation in this case to establish any liability, and this witness cannot testify to that.

THE COURT: I think that is correct.

MR. PENN: Your Honor, that's ignoring the testimony of Miss Martin (sic) yesterday, who laid the foundation for this.

THE COURT: I did not hear him mention any figures of any kind.

MR. PENN: During her testimony?

THE COURT: Yes. I do not recall that.

MR. PENN: I believe she did, Your Honor. I could be wrong.

THE COURT: I think you are.

[IV-53] MR. PENN: Okay. I know Mrs. Murphy spent a considerable amount of time talking about the Quebec sales tax.

THE COURT: I remember his testimony about that. He never mentioned any figure.

Go on to the next question.

MR. PENN: May I consult with co-counsel, Your Honor?

THE COURT: All right. Let's move this along, shall we?

MR. PENN: Your Honor, I would like to revisit the QST issue. Can we, at sidebar?

THE COURT: No, no. Go on with the – whatever objection you have, state it.

BY MR. PENN:

Q Okay, Mr. Ryan, your next item is damages on new car sales.

A Yes, sir.

Q And what does that cover?

A That covers specifically the margin on new car sales for the year 2001.

Q Okay. And what was that amount?

A The amount is $940,384.

Q Then with your next item is lost sales of new cars.

A Yes.

[IV-54] Q And what does that cover?

A That covered ongoing loss of profits on the sale of new cars for the years 2002 through 2005.

Q And how did you calculate that?

A I calculated that using 2001 as a base year and anticipating a percentage increase, not only in volume, but in average selling price.

Q Okay. And what was that number?

A That number is $5,463,108.

THE COURT: What is it? That is not what I have here.

MR. PENN: Again –

THE WITNESS: Item seven.

THE COURT: Item number seven –

THE WITNESS: 5,463,108.

THE COURT: All right, yes.

BY MR. PENN:

Q The next item, number eight, is profits on parts sales for 2001 through 2005?

A I can't be absolutely – yes, 2001 through 2005 in the amount of 1,355,229.

Q How did you arrive at that figure?

A Again, that was based on a base year parts sales number increased by a percentage factor to allow for volume and price increases.

[IV-55] Q Okay. And then the last item you have on this list is the delivery of refused eighty-two cars that were not delivered.

A Yes. And the amount is –

MR. ELLINGTON: Objection, Your Honor. This claim is not part of the case at this point, and we object to the inclusion of any damages on this issue.

THE COURT: Sustained.

BY MR. PENN:

Q Also as a part of your report, did you do an evaluation of the value of Club Car (Quebec)?

A Yes, I did.

Q And how did you do that calculation?

A Based on –

MR. ELLINGTON: Your Honor, I'm going to object. There's nothing in this report in the summary about the valuation of Club Car (Quebec).

MR. PENN: Your Honor, I refer you to page 4 of the report which states, "A revised sales volume would be $3,563,548," and based on this –

THE COURT: Wait a minute. You said page 4?

MR. PENN: Page 4.

THE COURT: What finding are you referring to?

MR. PENN: I'm referring to the middle paragraph at the top of the page, that sentence that begins, "A [IV-56] revised sales volume would be," and he provides a number. "Based on this, the company would have had an estimated market value of . . . "

MR. ELLINGTON: Your Honor, I'm going to object to his testifying to that figure

THE COURT: That is what it says.

MR. ELLINGTON: But, Your Honor, it's not part of the summary of conclusions and damages.

THE COURT: It is part of his report. I will allow the question.

BY MR. PENN:

Q Mr. Ryan, how did you calculate the value of the business?

A Based on an analysis I had prepared of the annual sales volumes of new and used cars, and again, my opinion – an appropriate valuation technique, considering the synergies that would be involved in similar businesses, I used a factor of 75 percent of the average of the last three years' sales.

Q Okay. You said – you refer to an evaluation technique. Are there other ways to value businesses?

A There are virtually hundreds of different techniques for valuing businesses.

Q And have you, indeed, valued businesses with various different techniques over the years?

[IV-57] A I have been involved, over the course of my business career, on both sides of negotiations for purchasing or selling a business and determining, through negotiations, appropriate value.

Q Why did you chose [sic] this particular technique to value CCQ?

A It was the simplest and most straightforward and I think the most appropriate way of evaluating the company.

Q Why do you think it's the most appropriate under the circumstances?

A Where the potential acquirer was in a similar business and where their records were not available to me, it was not possible to calculate the economies and synergies that they would benefit from.

So it would appear appropriate that if you acquired this business, that it would be pure add-on gross margins, that any additional sales would generate profits which would drop straight to the bottom line.

And, therefore, this was an appropriate technique.

Q Okay. And you used a calculation of 75 percent of the average three year sales volume?

A Yes, sir.

Q What was the average sales volume for CCQ?

A That is –

Q What was the number?

[IV-58] A The number that is in my report is the average annual sales, which was $3,341,182.

Q And what about the revised sales volume number? Do you see what I'm referring to below that one (indicating)?

A Yes, a revised sales volume would be $3,563,548.

Q What do you mean by a "revised sales volume number"?

A The annual sales number, in my opinion, had been depressed because of the competitive pressures.

And I felt it was appropriate to increase the gross sales numbers by a percentage of 6.24 percent.

Q So you increased the sales volume by about 6 percent?

A That's correct.

Q And then you applied this calculation. And what number did you arrive at for the value of the business?

A I arrived at a value of the business of $2,672,661.

Q Quickly, I want to go back to your summary and conclusions, your number four item that we talked about.

A Yes.

Q That particular number, the $201,100, that was in U.S. dollars?

A Yes, it is.

MR. ELLINGTON: Objection, Your Honor. You have ruled that out before.

MR. PURCELL: That's my same objection, Your Honor, you did.

[IV-59] MR. PENN: We had a sidebar on that, Your Honor.

THE COURT: His contention is that it's applicable against Champigny and that he concedes that the ruling was not applicable to Club Car.

MR. ELLINGTON: Thank you, Your Honor.

BY MR. PENN:

Q And that number – are all of the other numbers in your report in Canadian dollars?

A Yes, they are.

Q So that particular number would have to be converted?

A Yes, sir.

Q How do you convert –

THE COURT: That is a matter for the Court to determine.

MR. PENN: Thank you, Your Honor.

BY MR. PENN:

Q All right. Now I want to talk to you a little about – it has already been raised – your relationship with the Murphys.

How long have you known the Murphys?

A Since 1966.

Q And do you consider them friends?

A Yes, I do.

Q Do you have a personal relationship with then [sic]?

A Yes.

[IV-60] Q Have you also had a business relationship with them?

A Yes.

Q How long has that business relationship lasted?

A I would say our business relationship probably started in 1970 or '71 and has continued since then.

Q And does the fact that you have a personal relationship with the Murphys, that you've known them for a number of years, have any affect on your objectivity in reviewing the information in this case?

MR. ELLINGTON: Objection, Your Honor.

MR. PENN: That's not a leading question, Your Honor.

THE COURT: It is an improper question. Go ahead and ask another.

BY MR. PENN:

Q Let's talk a little bit about – there has been discussion in this case about financial statement year-end numbers for CCQ. And numbers for the years 1996, 1997, 1998, and 1999 were put on the board.

During those years, did you have a financial involvement with CCQ on a professional basis?

A I would have acted as Mr. and Mrs. Murphy's financial business advisor in those years, yes.

Q During that time, would you have reviewed financial statements?

[IV-61] A Yes.

Q Would you have? And reviewed tax returns?

A I might have reviewed them. I was not preparing them at that particular point in time.

Q And there were numbers that were discussed – I think in '96, there was a loss; I think in '97, there was forty thousand dollars: in '98, thirty; in '99, forty something – in the mid thirties to forties as far as financial statement numbers.

Can you tell us how those numbers are arrived at for CCQ?

A Those numbers would have been arrived at by applying generally accepted accounting principles, charging out depreciation, including expenses of the fur business and any losses arising from there.

Q Do those numbers have any affect on the value of the business?

A They would be a factor in considering the value of the business, but they wouldn't be the primary basis, no.

Q Would you use those numbers in calculating the value of the business?

A They would be one factor, depending on the method that you chose.

Q And I want to talk a little bit about – there has been some testimony that you had been in a few meetings with the [IV-62] Murphys.

A Yes.

Q And Club Car was also involved in those meetings?

A Yes.

Q How many meetings do you remember going to?

A I remember specifically only three occasions.

One – the first meeting would have been December '98 or January '99 with Mr. and Mrs. Murphy, Mr. O'Brien, and I have forgotten the other gentleman's name.

Q Tell the ladies and gentlemen of the jury what you remember about that meeting?

MR. ELLINGTON: Your Honor, I would ask at this point an instruction because he is obviously not testifying in any expert capacity at this point regarding these meetings that he participated in.

THE COURT: He is just a witness, yes. And that is true. He is not testifying as an expert with respect to what occurred at that time.

Go ahead. Let's get through with this witness.

MR. PENN: All right, sir.

THE WITNESS: The first meeting was specifically to discuss the mechanics and the possibilities of splitting the Quebec territory.

BY MR. PENN:

Q Okay. Let's talk about the April 2000 meeting. Did [IV-63] you attend that meeting?

A Yes, I did.

Q Tell us a little bit about that meeting.

A Mr. Murphy, prior to the meeting, had received a registered letter from a Mr. Hooper in Ontario confirming the date of the meeting to discuss their ongoing relationship, I believe was the general tone of the letter.

Mr. Murphy asked me, in my capacity as his business advisor, if I would go to that meeting, which I did.

The meeting was not what I think any of the three of us had expected. In fact, there was a great deal of dialogue and credit concerns and whatever that had not been raised prior to the meeting, which I think were satisfactorily addressed.

Q Let me stop you right there.

At that time, did you have knowledge of the financial condition of CCQ?

A I had an ongoing and constant exposure to the financial position of CCQ, yes.

Q And during that meeting, were there any conditions given for the distributorship?

A Mr. Dakuras indicated that he thought the current six month contract was probational. That had never been communicated to the Murphys, to my knowledge.

And there was – there were undertakings given by the [IV-64] Murphys in response to items that were discussed at that meeting.

And the meeting terminated on the point that Mr. Dakuras or Mr. Hooper were to provide the Murphys with a list of outstanding items which could then be dealt with at a later date.

Q After that meeting, did you have another meeting with Mr. Murphy and Club Car?

A Subsequent to the April meeting, Mr. Murphy and I met Mr. Hooper in Cambridge, Ontario, which is the head office for the Ontario distributorship.

Q What was discussed at that meeting?

A We discussed specifically the problems of competing with new cars versus virtually identical one year old cars.

We talked about the level of orders and the sales quota, the fact that the one year old cars were not a problem in the Ontario market because they were not sold in the Ontario market.

And we discussed, in general – lots of general business terms, how to try to increase the number of new cars that Mr. Murphy could sell in the Province of Quebec.

Q Okay. After the April meeting, was there ever a letter sent by the Murphys or Mr. Murphy to Mr. Dakuras or anyone else at Club Car?

A Yes. There was a letter sent after the April meeting [IV-65] by Mr. and Mrs. Murphy, which, as their business advisor, I reviewed. And in fact, I recommended that they write that, which laid out in some detail exactly what had transpired in terms of what Mr. Dakuras had referred to as credit problems and slow payment and, I thought, adequately explained and verified exactly what had taken place.

Q Did you help put that letter together?

A Yes, I did.

Q And it was dated May 8th of 2000 to Mr. Dakuras. And it says:

> During our recent meeting, you mentioned that there had been concerns expressed about our credit and payment history. We have now completed a review and the account has been fully paid.

Was that – is that your understanding of the financial concerns that were raised at the April 2000 meeting?

A Yes.

> Q In the interest of fairness, I believe the following information should be taken into account.
>
> In the fall of 1998 Club Car (Quebec) was indebted to Club Car International in the amount due of $510,000. By March of 1999, the amount had been reduced to $214,000 and [IV-66] at your request, we signed a promissory note in that amount due November 1st, 1999. In August 1999, this amount was reduced to $102,500 by applying credit notes and this amount was paid

in full on time. Interest on the outstanding balance was paid monthly during the term of the note.

All parts ordered during the 1999 season were processed on a COD basis and although inconvenient for us, we understood the necessity and believe that there were no major problems in this area.

For 1999, Club Car International and Club Car (Quebec) agreed that purchases were to be floor planned through Newcourt. In September 1999, having heard nothing from Newcourt, we contacted Treasury to see if they had any information relative to these transactions. The result of our inquiry was a memo to Anita from Connie Edwards dated October 7, 1999, which said, in part: "Due to an administrative billing error, these transactions were not booked with Newcourt and are currently on your Club Car account."

The invoices listed in this memo totaled [IV-67] $800,000 of which $730,000 was past due. Four of the five invoices were originally billed to Newcourt and only the most recent was invoiced to us. We can well understand how an overdue amount of this magnitude would raise concerns in the Credit department, but in our defense, we were never contacted about any overdue invoices.

By December of 1999, all outstanding invoices except for one had been paid in full. The last invoice was held pending processing of credit notes. In February of 2000, we paid $80,000 on account and after an exhaustive review, the account was finally settled by processing $120,000

of credit notes and approximately $53,000 of additional invoices. The long delay in resolving outstanding credit notes was a function of the number of credit notes and the period covered.

As a privately-owned company, our financial statements are prepared with specific objectives in mind. Hopefully, the credit agreement, which has been signed, will satisfy any credit concerns.

[IV-68] Please extend to Angie Arnold, Connie Edwards and all their staff our appreciation for their efforts in resolving all these outstanding issues.

Did you ever hear any response to that letter?

A No.

MR. PENN: Thank you.

CROSS EXAMINATION

BY MR. ELLINGTON:

Q Good morning, Mr. Ryan.

A Good morning.

Q Mr. Murphy has been a very close friend of yours for thirty-five plus years; is that right?

A Yes.

Q In fact, you and Mr. Murphy were curling buddies, weren't you?

A Yes.

Q Curling is a sport that's very popular in Canada, isn't it?

A Yes.

Q In fact, you have worked together over the years; is that right?

A In my role as a financial advisor for Club Car (Quebec) and their companies, yes.

Q You have traveled together before, correct?

[IV-69] A Yes.

Q You are the godfather of the Murphys' daughter, aren't you?

A Yes.

Q You, in fact, have been in constant touch and communications with the Murphys for thirty-five years?

A Yes.

Q You have vacationed in Europe together with them, haven't you?

A In 1976, yes.

Q You traveled to Cape Cod together, haven't you?

A Yes.

Q You've shared a Laurentien cottage together, haven't you?

A In the early years, yes.

Q Gone to Las Vegas together, haven't you?

A Yes.

Q You and Mr. Murphy always play golf together?

A When the occasion presents itself, yes.

Q You see the Murphys on a very regular basis, don't you?

A When we can. I'm located in Oakville, and they are in Montreal.

Q But you speak to the Murphys a minimum of twice a week, don't you?

A I wouldn't say a minimum of twice a week. Certainly [IV-70] over the last two years, we've been more in regular communication.

Q You wouldn't say a minimum of twice a week?

A I would say in the last two years, we certainly have. But that is more involved with this case than with our personal relationship.

Q You indeed are best friends with Mr. Murphy, aren't you?

A Yes.

Q You have given Mr. Murphy advice on legal documents, haven't you?

A I've given him business advice, yes.

Q On legal documents, correct?

A On documents he presented to me and asked me for my opinion.

Q Legal documents.

Now you went to this April 8, 2000 meeting at the request of the Murphys, didn't you?

A Yes, I did.

Q Okay. You weren't specifically invited by anybody from Club Car, were you?

A No.

Q And the subjects that were discussed at that meeting included the market share numbers of CCQ; is that right?

A No.

[IV-71] Q That's not right?

A We didn't talk about market shares specifically, no. We talked about specific sales numbers in terms of number of new cars sold.

Q Well, Mr. Ryan, let me direct you to your first deposition in this case, which, I believe, is dated May 9th of 2002.

At page 89, line 17, in your answer to the question regarding the input into the business or marketing plan that was discussed at that meeting, you made the statement, "The situation market share was discussed."

Do you remember making that statement to me at your deposition?

A Yes. Okay. I apologize. I thought you were referring to a percentage market share, which we did not discuss. But we certainly discussed it at some length in an attempt to determine what the market share was because those statistics were not available at the meeting.

Q And you also discussed at that time that the six month contract, distributor agreement, that was in effect at the time, was a probational agreement; is that right?

A That was Mr. Dakuras' position, yes.

Q And service issues involving CCQ were discussed at that meeting; is that right?

A A couple of minor service issues were discussed, yes.

[IV-72] Q The location of CCQ's warehouse was discussed at that meeting, wasn't it?

A Yes.

Q CCQ's facilities were discussed at that meeting?

A Yes.

Q And then you were at that May meeting in Cambridge, is that right, May of 2000?

A That's correct.

Q And, again, you were invited to that meeting by Mr. Murphy, is that right?

A Yes, I was.

Q And previously, you had been in a meeting sometime in late '98 or early '99 where Ray Bentley and Dan O'Brien were present along with Mr. and Mrs. Murphy; is that correct?

A Yes. Thanks for reminding me of his name.

Q And you were at that meeting?

A Yes, I was.

Q And you were not invited by anybody at Club Car; is that right?

A That's correct.

Q But you came to the meeting at the request of Mr. Murphy?

A Yes, I did.

Q Now, Mr. Ryan, you have done accounting for Club Car (Quebec) previously; is that right?

[IV-73] A Yes.

Q Okay. You've done accounting work for a new corporation called Golf Cart Quebec, haven't you?

A Yes, I have.

Q And you did accounting work for Golf Cart Quebec in the year 2000, didn't you?

A Yes.

Q Now your work with Golf Cart Quebec, the new corporation, has been in the same capacity as what you did for Club Car (Quebec), hasn't it?

A More or less, yes.

Q And you are Golf Cart Quebec's business and financial advisor regarding transferring assets from CCQ to Golf Cart Quebec; is that right?

A To be more specific, there were assets which were sold and purchased, as opposed to transferred.

Q You were –

A I'm aware of that transaction.

Q And you were Golf Cart Quebec's business and financial advisor regarding that movement of assets; is that right?

A I don't recall specifically dealing with that transaction. But I would say yes, if I was their business advisor, we would certainly have talked about the new company purchasing certain assets from Club Car (Quebec).

Q So you would agree with me that you operated as a [IV-74] business and financial advisor regarding that transaction?

A Yes.

Q Okay. And in that role, you concurred with the Murphys' plans to set up a separate company because of this litigation we're involved in right now, didn't you?

A They asked me if I thought it was appropriate to set up a new company, and I said yes.

Q You concurred with that. And your advice was to operate a separate company under a separate corporate umbrella with this litigation in process; is that right?

A Yes.

Q And the reason being for the purposes of a limited liability; isn't that right?

A Corporations have limited liability, yes.

Q And that's the reason why, correct?

A I wouldn't say that's the only reason.

Q But that is a reason why?

A That would be one of the reasons, yes.

Q And you concurred with that for the purpose of limited liability, giving that business advice?

A I concurred with Mrs. Murphy setting up a new company, yes.

Q For that purpose, correct?

A There were several purposes.

Q That's one of the purposes?

[IV-75] A That would be one of the purposes, yes.

Q And you have also operated as a litigation consultant to the Murphys in this case, haven't you?

A Yes.

Q And in the earlier stages of this particular litigation, you've given advice to the Murphys in your capacity as a business advisor, haven't you?

A I would do that on an ongoing basis.

Q So the answer was "yes" then?

A Yes.

Q Now you've never testified as an expert witness before; isn't that what I heard earlier?

A That's correct.

Q Your only background in the golf industry has been your particular relationship with CCQ; is that right?

A Quebec is a very small market. Yes, that's my experience.

Q You don't have any other background in the golf industry other than playing golf, do you?

A I have served on the board of directors with a couple of golf clubs. I'm familiar with the operations and the processes that go on in renting, leasing, and buying cars.

Q But you don't have any other golf distributor as a client other than CCQ?

A There aren't too many golf distributors in the Province [IV-76] of Quebec.

Q So the answer is "no"?

A The answer is "no."

Q Now you've had some experience in the film industry; isn't that right?

A That's correct.

Q And you've been involved in supervising or dealing with production partners with several movies and TV shows, haven't you?

A Yes.

Q One of those would be something called "A Savage Place"?

A I don't recall that.

Q You don't recall "A Savage Place"?

A No, I don't.

Let me see. If I can, let me show you your resume that has been provided, a CV.

MR. ELLINGTON: If I may approach the witness, Your Honor?

BY MR. ELLINGTON:

A [sic] And is "A Savage Place" listed as one of the particular items here?

A Yes, it is. I recall that movie now. Thank you.

Q And you also were involved in something called "Judas Goat;" is that right?

[IV-77] A Yes.

Q And a particular production called "The Quarrel"?

A Yes.

Q And "Prom Night III"?

A Yes.

Q Now, Mr. Ryan, in this case, it's my understanding that you are going to be charging a fee for your services; is that right?

A Yes, it is.

Q And that fee is going to be somewhere between zero and twenty-five thousand dollars, but that fee hasn't been determined, has it?

A Yes, it has.

Q It has been determined?

A Yes.

Q Okay. Well, when I deposed you back in, I believe, May of 2000 – sorry – May of 2002, I asked you –

MR. ELLINGTON: I'm at page 23 of the deposition.

BY MR. ELLINGTON:

Q I said:

> Have you determined to charge a flat fee of twenty-five thousand dollars, or is that a maximum fee?
>
> You answered: That's a maximum.

Is that right?

[IV-78] A At that point in time, that was correct, yes.

Q And then my next question is:

> Might your total fee be less than that?
> And you said: It might.

A At that point in time, that was correct, yes.

Q And I asked you how you would so calculate.

And your methodology – your answer was, "Well, that would be between myself and my conscience;" is that right?

A Yes.

Q Mr. Ryan, you have not operated as the accountant for CCQ for some number of years, have you?

A Can you clarify what you mean by "operate as the accountant"?

Q Well, you have not been CCQ's accountant since 1986, have you?

A Actually, I have been CCQ's accountant since 1999. I think 1999 was the last year Mr. Despatis prepared the financial statement.

Q Well, Mr. Ryan, I asked you – do you remember your deposition which was in – I believe this was in Toronto in June of 2002. Do you remember that deposition?

A I do.

Q That was the deposition in which you were sworn in and swore to tell the truth, right?

A That's correct.

[IV-79] Q And I asked you at that point, I said:

> Let me just question you.

You provided an answer:

> Regarding – for a period of time the accountant for Mr. Murphy – during my overseas trip, which was '74 to '76, and then we reestablished our relationship on my return.
>
> And then you said: Beginning at some point after moving to Toronto from Montreal in 1986, he recommended to Murphy that he employ a local accountant, which he did.

Do you remember that testimony?

A Yes, I do.

Q And I asked you:

> Who was that, to your knowledge? And you said: The gentleman's name was Jacques Despatis.

And my question: His firm is Despatis and Associates?

Your answer was: I believe that's correct.

Is that right?

A Yes.

Q And my question is, I said:

Okay. Mr. Despatis and Associates [IV-80] became involved as Club Car (Quebec)'s accountant. Did you have any further role as Club Car (Quebec)'s accountant?

Your answer was: Not as their accountant, no.

Do you remember that answer?

A If you're reading the transcript –

Q I'd be happy to show it to you.

A I'm not doubting it. And I would have answered at that particular point in time, had I prepared any financial statements or tax returns for Club Car (Quebec). And the answer would have been no, I had not acted in that capacity.

Q And Despatis and Associates is a reputable accounting firm in Canada; is it not?

A I believe they are reputable.

Q Now –

MR. ELLINGTON: Your Honor, if I can have just a moment to set up the easel.

BY MR. ELLINGTON:

Q Now, Mr. Ryan, you have provided a report that I believe you have in front of you today; is that right?

A Yes.

Q And in this report, you make a specific assumption at the beginning of the report that the Club Car (Quebec) was an exclusive distributor in the Province of Quebec for Club [IV-81] Car; is that correct?

A For new cars and new parts, yes.

Q And that's a specific assumption that you have made for the purposes of your report, correct?

A Yes.

Q Now, Mr. Ryan, let me show you a document which has previously been admitted into evidence as Plaintiff's Exhibit 1.

Can you see that?

A Nope.

Q All right. Let me provide you, if I can, with Plaintiff's Exhibit 1 here, which is the same document, but should be a little easier to read.

And you would agree with me, would you not, if you look at paragraph two, this agreement specifies that Club Car (Quebec) is granted non-exclusive right to market the product within the territory.

Do you agree with that?

A That would be the wording in this document.

Q Do you agree with that, sir?

A You're asking me – you objected originally to me giving a legal opinion. You're asking me to comment on a legal document.

I don't think I'm qualified to give that opinion.

Q So you're not qualified to give an opinion as to [IV-82] whether or not the relationship between CCQ and Club Car was either an exclusive or non-exclusive arrangement?

A Based on my review of the website and the fact that my knowledge –

Q Mr. Ryan, yes or no?

A You're asking me whether or not I will give a legal opinion on a legal document. I'm not qualified to do that.

Q You're not qualified to state whether this a non-exclusive agreement?

A No.

Q All right. And in paragraph 18 of this agreement, it says, "Agreement, non-exclusive."

Have you reviewed that as part of your opinion in this case?

A I would have reviewed the distributorship agreement as part of my opinion.

Q And after reviewing the distributorship agreement, you came up with the conclusion that is the basis of your expert report that Club Car (Quebec) is an exclusive distributor; is that right?

A I reached that conclusion after reviewing this document, amongst many others, yes.

Q And you agree with me that this says "Agreement, non-exclusive" here?

A I'm agreeing with you what it says, yes.

[IV-83] Q How long did this particular distributor agreement last?

A This particular agreement became effective on March 1st, 2000 and expired on September 1st, 2000.

Q All right. So this agreement would only last until its end date of September 1, 2000; is that right?

A Based on what is written.

Q Now your report is based upon CCQ being, as you define it, an exclusive distributor in Quebec, correct?

A Yes.

Q And if CCQ was not an exclusive distributor, that would change your opinion, wouldn't it?

A It might affect my opinion in some way, yes.

Q And your report here – you have – is based upon your review of CCQ's financial statements; isn't that right?

A In part, yes.

Q And some of the extrapolations that you have made in your report have been based upon gut instinct, haven't they?

A A certain amount of business judgments, if you prefer that term.

Q Well, I'm going to use that term because – do you recall giving me that term in response to a question in your deposition?

A I would have used it. And it's a commonly used term. It may not be what you would use, but it is what I used at [IV-84] that particular point in time.

Q And some extrapolations you made were based upon what you described as a "shot in the dark;" isn't that right?

A I don't recall using that expression specifically.

Q If I can, let me direct you to your deposition dated June 3, 2002, at page 167, line 24. At that point, I asked you a question:

> Where did you get the six hundred dollar figure from?
>
> Answer: It's a shot in the dark.

Do you remember that?

A If I can ask for a clarification, the six hundred dollars was relative to what?

Q I believe it was with respect to parts packages.

A At that particular point in time, a significant volume of documents had not been produced, and we did not have any information on the parts packages at that point in time.

So at that point in time, for a preliminary report, it was, in fact, our best estimate, or a shot in the dark.

Q And in reaching some of the conclusions in your report, you have made the assumption that CCQ would have bought every used car that EPC purchased; isn't that right?

A Yes.

Q And if that's not the case, then that would change your opinion, wouldn't it?

[IV-85] A If the facts that I had assumed are not the case, then it would affect my opinion.

Q And that would affect your ultimate conclusion, correct?

A It could affect it up or down, yes.

Q And you've assumed, as part of your report, that every car that EPC, Equipements Pierre Champigny, sold in 2001 was the result of CCQ's sales and marketing efforts; isn't that right?

A Barring any information to the contrary, yes.

Q If that is not the case, then that is going to change your opinion and conclusions, correct?

A I have already stated that if the facts change, the conclusions would change.

Q And you have made an assumption in your report that no other distributor is treated like CCQ, haven't you?

A I don't know that I reached that conclusion. I said no other distributor was treated like CCQ?

Q Well, you make a statement – I am currently on page 2 of your report.

You say that no – let's see – you say you have never seen a situation where used product was unloaded from corporately owned territories into those of independent distributors.

Do you remember making that statement?

[IV-86] A Yes.

Q That was one of the assumption you made in reaching your conclusion?

A I said I had never seen it. I didn't say that CCQ was treated like no other distributor.

Q All right. Well, if used cars – or parts packages were sold in other distributor territories, that would change your opinion, wouldn't it?

A It might.

Q Now in reaching your opinion here, in this report you have provided, you have said – or you've assumed that the relationship between Club Car and CCQ was going to continue indefinitely, in perpetuity; isn't that right?

A Based on their sales performance, yes.

Q And you have said in your report that that relationship would extend for ten or twenty years. That's an assumption?

A I couldn't foresee terminating – based on the information available to me – was quite a successful arrangement.

Q And, Mr. Ryan, if, indeed, the relationship between Club Car and CCQ were limited to a specific period of time, such as reflected in this distributor agreement, that would significantly affect your opinion, wouldn't it?

A I've already testified that as the situation and facts changed, then my conclusions might well change.

[IV-87] Q So your answer would be yes?

A If the facts changed, yes.

THE COURT: Would the jury like a break at this time?

(Jury out at 10:58 a.m.)

THE COURT: All right. Ten minutes, Marshal. (Recess at 10:59 a.m. until 11:11 a.m.)

THE COURT: Go ahead, Mr. Ellington.

MR. ELLINGTON: Thank you, Your Honor.

BY MR. ELLINGTON:

Q Mr. Ryan, there have been a number of documents that have been admitted into evidence. These are CCQ's financial statements over the period of 1993 through 1999 which were prepared by Despatis and Associates.

Have you reviewed those financial statements as part of your financial report?

A I don't believe so.

Q You haven't reviewed those. All right.

Let's – this is the same Despatis and Associates that you recommended that CCQ retain as its accountants?

A I did not recommend it, no.

Q You did not make that recommendation?

A No, I didn't. I recommended they employ someone locally. I didn't recommend a specific firm.

Q I'm sorry. I think I recall a little differently. I [IV-88] think we went over some testimony earlier where I had asked you, and you had responded, at some point,

after moving to Toronto, you recommend to Mr. Murphy to employ a local accountant.

And I asked you: Who was that?

And you said: The gentleman's name is

Jacques Despatis.

Is this –

A That's correct. I know who it is, but I didn't recommend him specifically.

Q Okay. Very good. But to your knowledge, this is a reputable accounting firm?

A To my knowledge, yes.

Q Now these financial statements represent a period of time – actually, I think we can gather some information starting in 1992 for the business of CCQ, which for 1992, had a net income – actually a net loss of $4,849.

In 1993, a net income of $26,339.

In 1994, I believe it's $27,547.

And in 1995, $111,395.

In 1996, a loss of $46,267.

In 1997, net earnings of $43,940.

1998, net earnings of $1,365.

In 1999, net earnings of $33,567.

And these are exhibits which have been admitted into [IV-89] evidence as Exhibits 107 through 113.

And the total, as I come up with it over that period of one, two, three, four, five, six, seven, eight years is $193,037.

Mr. Ryan, let me let you take a look at these financial statements, which have been marked as 107 through 113, and ask you to take a look at those and confirm for us that these, indeed, are the net earnings numbers over that eight-year period.

A They would appear to be correct.

Q All right. And so over that eight-year period, there is a total net income for the business, CCQ, of a little less than two hundred thousand dollars, and you are now claiming that the total damages in this lawsuit to CCQ is $10,464,000; is that right?

A That's correct.

Q Mr. Ryan, you had a preliminary report in this case when I deposed you back in June, in which you had calculated damages of $2,700,000; is that right?

A I don't have the preliminary report in front of me.

Q I would be happy to show it to you.

MR. HARRIS: If I may approach, Your Honor?

BY MR. ELLINGTON:

Q Is this the preliminary report of Peter Ryan, which was marked as Exhibit 215 to your June deposition?

[IV-90] A It would appear to be.

Q And the total bottom line damages you calculated then, could you tell us what that number is?

A At that point in my preliminary report, which was subject to subsequent production of documents and further work, the total damages identified to date were $2,728,583.

Q If I could have that back, sir? Thank you.

Now in your summary and conclusions there in your report, you are calculating out certain damages three, four, five years into the future, aren't you?

A Yes.

Q Lost sales of new cars is $5,400,000. That's going up through 2005, isn't, it?

A That's correct.

Q Profits on parts sales going up through 2005, $1,355,000; isn't that the figure you reached?

A Yes.

Q And you would agree with me that the term of this distributor agreement, which is marked as Exhibit 1 in this case, expired on September 1, 2000, didn't you?

A That's what the contract says apparently, yes.

Q Are you aware of any contract or distributor agreement entered into between Club Car and CCQ for a period of time longer than one year?

A Not that I am aware of, no.

[IV-91] Q And, Mr. Ryan, you would agree with me that transferring the assets out of a business would negatively affect the valuation of that business, wouldn't you?

A That would depend on the nature of the assets that were transferred and the nature of the business subsequent.

Q Well, let's assume we have a widget distributor. And the widget distributor has assets of – we'll just pick a number of a hundred thousand dollars.

And the widget distributor transfers a hundred thousand dollars of assets to a separate company that manufactures digits.

Now when you transfer that money from the widget distributor to the digit distributor, that's going to negatively impact the valuation of the widget distributor, isn't it?

A No. You will have to bear with me because digits and widgets – I think you said widgets.

Q Well, widgets is the first one and – I studied economics and –

A It would depend entirely on what course of business action the widget manufacturer chose to undertake and what they did subsequent.

In any event, items or events that have happened will affect the company one way or the other, subsequently.

Q Now the letter that you wrote, which I believe is [IV-92] Exhibit 115.

THE COURT: That is Plaintiff's exhibit?

MR. ELLINGTON: Yes, Your Honor. Plaintiff's Exhibit 115. I'm doing my best – any exhibits that I refer to, I'm doing my best to refer to the number. If I use a Defendants' exhibit, I will endeavor to use that.

BY MR. ELLINGTON:

Q But for benefit of our record, Plaintiff's Exhibit 115 is a letter dated May 8, 2000. And this is a letter that you drafted; is it not?

A It is a letter I helped draft, but I didn't write the letter.

Q You didn't write the letter.

Well, let's look at it here. The fax cover page – do you see this fax cover page on this letter

A Yes.

Q And it's from Cumbermore Consults, Inc. in Oakville. That's your business; is it not?

A Yes, it is.

Q And this is a fax directed to W. Dakuras, dated 5/8/00?

A Yes.

Q And you're saying you didn't prepare this letter?

A I said I helped in preparing the letter.

Q And that was a specific letter that went to Mr. Dakuras at Club Car prior to when this particular litigation ensued, [IV-93] right?

A What was the date on the letter?

Q May 8 of 2000.

A I believe that was prior to the litigation, yes.

Q And a couple of months later, after Mr. Murphy learned that he was not going to be offered a new distributor agreement, Mr. Murphy told you that he intended to bring suit against Club Car in Quebec, didn't he?

A Yes, he did.

Q And he said he intended to move with alacrity and speed, didn't he?

A I doubt those are Mr. Murphy's words. They are more likely my words and my interpretation of what he said to me, yes.

Q So you wouldn't disagree with the notion that he intended to move with alacrity and speed, would you?

A I would have been surprised if he hadn't under the circumstances.

MR. ELLINGTON: Your Honor, if I could have just a moment to consult with co-counsel?

(Pause)

MR. ELLINGTON: Your Honor, I don't have any further questions for Mr. Ryan.

THE COURT: Are you ready, Mr. Purcell?

MR. PURCELL: Yes, Your Honor.

[IV-94] THE COURT: Go ahead.

CROSS EXAMINATION

BY MR. PURCELL:

Q Mr. Ryan, the numbers you have already given the jury and the eight items you have talked about are all gross sales and gross profit numbers, weren't they, sir?

A Yes.

Q They did not consider that the business, in generating those sales and in generating those profits, would have any expenses whatsoever, did they, sir?

A No.

Q As a matter of fact, when you looked at the lost sales on one year old cars from '97 to 2000, you just considered that those were profits that Mr. Murphy or CCQ would be able to book into its bank account, didn't you?

A I made the assumption that incremental sales would fall directly to the bottom line, yes.

Q And similarly, you made the assumption that there would be no increase in the sales force in order to achieve a sales projection of over $5 million; isn't that right, sir?

A Can you direct me to –

Q Yes. That's number eight, or item number seven, the lost sales on new cars. You said over $5 million – you can generate gross sales of that amount of money and no additional cost, by virtue of your report, didn't you, sir?

[IV-95] A What I said specifically was that is a gross margin, and that is spread over five years. So the sales number would be sales would be –

Q It's spread over five years and it's margin – that's like over $20 million in sales in that time frame, isn't it sir?

A Yes, it is.

Q That would mean you would get a gross margin. When you tell the members of the jury that you're going to get a gross margin, you're saying to the members of the jury that the product is going to cost about $25 million – I beg your pardon – it's going to cost about $20 million, and you're going to be able to sell the product for about $25 million.

And you're going get a margin of around $5 million; isn't that what you're saying, sir?

A The margin number is the number that is included in my report, yes.

Q So that means that the business that you're talking about would have achieved a level of sales activity never witnessed in twenty years, doesn't it?

A Yes.

Q And it also means that it's going to put that $5 million directly into its pocket or its bank account without having to account for any expenses related to that $5 [IV-96] million; isn't that right?

A That's what's in my report, yes.

Q That's what I'm asking you about. The same thing about parts packages of over a million dollars; is that right?

A Yes.

Q So you have not considered in your analysis at all the concept of business earnings, have you?

A I have not taken into account any incremental or administrative expenses, no.

Q So we will all be clear about what your opinions include and what they don't include, you did not take earnings of the business before the effect of any activity that you claim injured the company; you did not take that into account, did you, sir?

A Can you repeat the question?

Q Certainly. I'll try to do a better job this time.

A I apologize. I'm a little – trying to stay with you.

Q I hear you.

You did not consider earnings before the trial had the company not been affected at all by Club Car or EPC? You didn't consider that in your report, did you?

A To the extent that I reviewed financial statements or financial results at either a gross or net profit basis, I would have taken it into account.

But I can't be more specific than that.

[IV-97] Q But that's not the number you're presenting to this jury. The earnings number of this company, had

these effects not occurred, you didn't present that to the jury, did you, sir, in your direct testimony?

A If it's not in my report, I didn't present it.

Q And similarly, you did not subtract from that number the actual earnings numbers of CCQ before trial, did you, sir?

A I don't know why I would do that.

Q Similarly, you did not add any prejudgment interest to get damages before trial, did you, sir?

A No, I did not.

Q And then you did not project earnings after trial had CCQ had these effects not occur, did you, sir?

A No, I didn't.

Q And you did not subtract the projected earnings after trial and did not discount any numbers, did you, sir?

A Can you be more explicit?

Q Sure. None of these numbers are discounted to present value, are they?

A No, they're not.

Q And none of these are projected earnings subtracted after trial, are they, sir?

A No.

Q In that way, you did not attempt to calculate damages [IV-98] after trial, did you, sir?

A No, I did not.

Q And you did not attempt to add any earnings damages before trial or any earnings damages after trial to reach a total damages calculation based on earnings, did you, sir?

A I'm sorry. You'll have to slow down.

Q What I'm saying is you didn't take that first number I just talked about, the damages before trial – or the earnings damages before trial, and add it to a figure after trial to reach a total earnings damages number, did you, sir?

A I apologize, but I honestly can't answer that question.

Q Well, since starting –

A In pretrial, post-trial –

Q Let me just ask you one thing, sir. It would be fair to say that earnings aren't in your calculations at all?

A That would depend on your definition of earnings.

Q Well, let's see if we can come to an agreement about what earnings are.

Earnings, you would agree, based on your experience, would be economic value received by CCQ. Earnings are measured net of cost; thus, lost earnings are lost receipts, less costs of goods; isn't that what earnings are?

A That would be one definition.

Q And that's not included in your report, is it?

[IV-99] A I testified previously that I had calculated damages at a gross margin number.

Q But in the real world, Mr. Ryan, you know very well that you cannot have increased sales profits of any sort without some associated costs; isn't that right?

A There might be some incremental costs, yes.

Q And you would agree with me that you have considered no costs at all associated with these figures?

A I have not allowed for any incremental or administrative costs. I believe I said that before.

Q Or costs of any sort?

A I beg your pardon?

Q Or costs of any sort, have you?

A Certainly the cost of the product has been taken into account, yes.

Q But that's it?

A I already said it's at a gross level, yes.

Q Thank you. Mr. Ryan, I want to direct you to a portion of your report. And I assume you still have it up there with you.

Did they give you the exhibits in your previous examination, as well?

A I still have my report and exhibits, yes.

Q Now counsel has previously directed your attention to the earnings figures.

[IV-100] And what I would like to do, sir, is talk with you for a second about what the many volumes of documents that you looked at have shown you about the

activities of Club Car and CCQ and EPC a little bit. And I'm going to direct your attention to what we have been talking about during the trial in your absence. And that is the sale of one year old cars.

And you looked at that issue in connection with your report and prepared an exhibit about it, didn't you, sir?

A Yes, I did.

Q And what you found was that prior to 1997 – I'm going to do a squiggly line here (indicating) to indicate what was going on after and before 1997.

And what you discovered was that prior to 1997, there were no one year old cars sent to Mr. Champigny's business; isn't that right?

A There were no documents presented to me that indicated that.

Q Okay. And you found that the first year that there were any one year cars sent into the territory and sold to Mr. Champigny's business was 1997; isn't that right?

A Either '96 or '97.

Q Let me refer you to your report. It's still before you. There is page number 52, I believe.

At least that's how I'm interpreting the designation of [IV-101] a page number.

Do you have that before you, sir?

A Just give me a second, please.

Q Absolutely.

A (Pause) According to – I don't know whether we're on the –

Q I'm on one year old sales. I want to see if I can find you an extra copy of it, just to speed this up a little bit.

It's listed on the bottom right-hand corner as page 52 exhibit to your report.

I found another copy, Mr. Ryan. This may speed us up a little bit (handing document).

A Thank you.

Q Now you prepared that document, didn't you, sir?

A Yes, I did.

Q Okay. Now what you found was that the first time the one year old cars came into the territory at all was in 1997, right?

A Yes.

Q And there was seventy of them, right?

A That's correct.

Q Seventy cars in 1997. So this loss of forty-six thousand dollars that CCQ sustained in 1996 wasn't the result of any one year old cars coming into the territory, was it?

[IV-102] A I don't know specifically what the loss was a result of.

Q But you know it couldn't have been as a result of seventy new cars coming in there because they didn't come in until 1997?

A It may have been – are we talking about the 1996 results?

Q We're talking about the 1996 result as affected by anything that happened in 1997.

And it's obvious it couldn't have had any affect?

A That's fine.

Q And you don't know how many of these seventy automobiles, if any, were even refurbished and sold by Mr. Champigny before they were sold, do you, sir? You don't know how many were refurbished before they were sold, do you?

A No, I don't.

Q You have no idea, do you?

A No, I don't.

Q In 1998, your document shows that of the one year old car sales, it was one hundred in that year, wasn't it?

A Yes, it does.

Q And you don't know whether any of those were refurbished before they were sold, do you, sir?

A No, I don't.

[IV-103] Q And then in 1999, the last full year before the contract went to Mr. Champigny, the total number of cars that went there that were one year old was two hundred and seventy-one.

And you don't know how many of those were refurbished either, do you, sir?

A No, I don't. But to be specific, in terms of the year, it's not a calendar year. I have based all my analyses on the September 30th year end.

Q I understand it's the end of the golf season there, so it can't have any effect; am I right?

A Yes.

Q Okay. So the fact of the matter is the first time you knew of any cars being one year old and refurbished was in 1999; isn't that right?

A I have no specific knowledge on any of the one year old cars, whether they were refurbished or not.

But it has been my understanding, and based on the evidence, that parts packages were provided specifically to refurbish the vehicles, not to be sold as new parts.

Q But you don't know how many of those, by your own testimony, that the parts packages actually went with the cars and how many times they didn't as to each of those years, do you, sir?

A Are you saying whether the parts were used to refurbish [IV-104] the vehicles?

Q No, sir. Whether they came with the car at all. You already told us you only estimated – your estimate was 90 percent, even though the numbers you could get ahold of showed less than 50 percent.

You don't know specifically is my point, do you?

A What my testimony was that I managed to match up parts packages for a thousand and some odd cars, and

there was a significant number – of other cars that I did not match specifically.

Q So you just assumed they went with them, didn't you?

A I made an assumption, yes.

Q Okay. And you would agree with me that the refurbished cars are a minuscule amount of the total used and new cars sold in Quebec in those years – '97, '98, and '99 – wouldn't you?

A I wouldn't leap to that conclusion without comparing the total sales for Quebec, which is a relatively small market.

Q And you would agree with me that as to the used cars, that that's a wide open market. We're talking not here about the one year old cars. But as to used cars, that's a wide open market, isn't it?

A Subject to the right of first refusal, yes.

Q That's your contention on Mr. Murphy's behalf that he [IV-105] had some first right of refusal, isn't it?

A It's my conclusion based on the evidence I examined, yes.

Q You being his advocate to advance that position, aren't you?

A I think I'm giving my independent opinions.

Q But you're giving that independent opinion not as an accountant but as someone interpreting legal documents and legal relationships, isn't that right, sir?

A Based on the evidence I reviewed, that was my conclusion.

Q That was your conclusion as a matter of law that he is entitled to a first right of refusal based on an agreement that's not written down anywhere; is that right?

A I can't be specific about whether it's a legal opinion or whether it's my opinion as a business opinion.

Q Okay. Your advocacy role extends to writing letters for your client?

A As Mr. Murphy's advisor, do I review correspondence when he asks me to. Yes, I do.

MR. PURCELL: That's all I have, Judge. Thank you.

MR. PENN: Thank you, Your Honor.

[IV-106] REDIRECT EXAMINATION

BY MR. PENN:

Q Mr. Ryan, all of these numbers that come from financial statements, every single one of these statements included the fur business, didn't they?

A To the best of my knowledge, yes.

Q In fact, was there a merger between the fur business and the golf car part of it?

A They were separate operating entities under the same corporate umbrella.

Q And what was the fur business like during this time period?

A I think it's safe to say the fur market for the last ten years has been pretty dreadful with the "environmentally friendly" and "save the animals people." That has had a significant impact on the fur business.

Q Was the fur business making money or losing money during this time period?

A Again, to the best of my knowledge, the fur business has not become profitable for a considerable period of time.

Q And, Mr. Ryan, if you would, please tell the ladies and gentlemen of the jury how these types of financial statements are put together? How are they calculated?

A I believe and the accountant's opinion says that he has prepared the financial statements from the books and records [IV-107] of the company, but he has not conducted an audit and, therefore, does not express an opinion as to the absolute accuracy of the statements, that they represent the books of the company to the best of their ability at that particular point in time.

Q What kinds of information are included in financial statements?

A Sales level costs of the gross product, administrative expenses, the salaries of the owners, the costs to run their vehicles, anything that goes along with running your own private business.

Q Would that include money that is paid to Mr. Murphy and Mrs. Murphy as salaries?

A Yes, it would.

Q Okay. And do these numbers are these the numbers that get put on tax returns?

A Yes.

Q And for purposes of the tax return, your experience, is the idea to make the number big or small?

A Small.

Q Now you were asked a little bit about the evaluation of the value of the business.

Do these financial statements that include the fur business affect your opinion as to the value of CCQ?

A No, they don't.

[IV-108] Q And are you familiar with Mr. Douglas Cates, who is the expert that's been retained by both of the other parties in this case?

A I have read his report, yes.

Q You have read his report. Are you also aware that he gave a technique for valuing a business?

A I believe it was mentioned to me that he has suggested that a multiple of cash flow is an appropriate valuation technique.

Q Do you remember what his multiple was from his testimony?

A Three to seven.

Q And based on your experience and your knowledge of CCQ, what was the cash flow of the business on a yearly bias?

A Again, looking at the cash flow, if you were transferring the operation to a similar business where the amount of the incremental administrative expenses would be minimal, I would have assessed the cash flow based on a sales volume of new vehicles and an average selling price and average gross margin.

And I would have determined that to be somewhere in the vicinity of six hundred thousand dollars a year.

Q So approximately six hundred thousand dollars a year?

A Arising from the sale of new cars.

Q Applying Mr. Cates' formula, that would give you a [IV-109] range of 1.8 million to 4.2 million?

MR. PURCELL: I'm going to object. Counsel is becoming the economist now.

THE COURT: What is your objection?

MR. PURCELL: My objection is it is a leading question and was answered in the worst possible way.

THE COURT: I will sustain it.

MR. PENN: Thank you.

BY MR. PENN:

Q You were asked a little bit about your charges. Are you charging for the time that you have put in as an accountant, as a professional, in this case and reviewing all of this information?

A Initially, when Mr. and Mrs. Murphy and I talked about my role as an expert in preparing an expert report, I

indicated to them that I really couldn't give them a hard fast number until I saw how much time was involved, but that I didn't think the fees would exceed twenty-five thousand dollars.

Subsequent to that, I think I have spent somewhere in excess of three hundred hours on this particular assignment. I have been in touch with the Murphys, and I have told them, although my actual time at my normal billing rates would far exceed the number that I intended to, and I have invoiced them in the amount of fifty thousand dollars (Canadian).

[IV-110] Q So that's your fee?

A That's my fee for the expert report, yes.

Q And you talked about – what is your typical hourly rate?

A It's somewhere between two hundred and two hundred and fifty an hour (Canadian).

Q Can you give us an estimate of how many hours you have spent on this case?

THE COURT: He just did.

THE WITNESS: I believe I said something more than three hundred hours.

MR. PENN: I apologize, Your Honor.

BY MR. PENN:

Q And this additional fee – before you testified, I believe, in deposition that it was twenty-five thousand. Now it's fifty thousand.

Does that also include travel time?

A No, it doesn't.

Q You were asked about your experience in the golf business. And I believe the question was your own experience is with CCQ.

Do you remember that question?

A Yes.

Q How long has your experience with CCQ covered? What time period?

[IV-111] A I believe it started in 1980 and has continued since then.

Q Okay. Does – to your knowledge, is there anyone who knows the financials of CCQ better than you?

A No.

Q You were asked about the exclusivity language in the contract. They put the contract up and asked you some questions related to your opinion as to whether Mr. Murphy had an exclusive distributorship or a non-exclusive distributorship.

Do you remember those questions?

A Yes, I do.

Q Does the fact that the business was an exclusive or non-exclusive distributorship change your opinion as to the numbers in this case?

A No, it doesn't.

Q Does it change your opinion as to the calculations of the numbers?

A No, it doesn't.

Q Does it change your opinion as to the value of the business?

A No, it doesn't.

Q There was also a reference to testimony about taking a shot in the dark in some of your calculations.

That was during one of your depositions?

[IV-112] A That was in my first deposition in Montreal. And it was based on my preliminary report, which was contingent on reviewing documents subsequently.

Q How many times have you been deposed in this case?

A Twice.

Q And when this "shot in the dark" comment was made, was that – did you have all the documents?

A No. At that particular point in time, we had been provided no information whatsoever on the parts packages.

Q Based on anything that you have been asked today or presented today in the form of charts or anything else, have your opinions changed?

A No.

Q You were asked about the sale of one year old cars, and it was represented to you, I think, that there were none before 1997.

Do you remember that question?

A Yes.

Q Could you tell if the documents that you received from Mr. Champigny and Club Car were complete in your review of those documents?

A There is no way, based on what was produced, that I could determine if it was complete.

Q Did Mr. Champigny produce to you any documents before 1997?

[IV-113] A Not to my knowledge.

Q And in the documents that you reviewed, were there occasions when some of the invoices from Mr. Champigny did not – were not produced by Club Car in return? Did you ever find that?

A Yes.

MR. PENN: Thank you.

MR. ELLINGTON: Your Honor, would I be permitted one recross question?

THE COURT: One.

RECROSS EXAMINATION

BY MR. ELLINGTON:

Q Mr. Ryan, have you been paid yet for your services?

A No.

MR. ELLINGTON: Thank you, Your Honor.

THE COURT: All right, Mr. Ryan, you may go down.

THE COURT: Who is next?

MR. HARRIS: We would rest at this time, Your Honor.

THE COURT: Let me ask you, Mr. Ryan: Was there any statistical data that supported the values which were ascribed to either the new or the used cars?

THE WITNESS: The statistical values that I used in my report were based on actual sales invoices and sales values.

[IV-114] THE COURT: Just on the invoices?

THE WITNESS: Yes.

THE COURT: All right. You may stand down.

You rest?

MR. HARRIS: We rest, Your Honor.

THE COURT: All right.

MR. PURCELL: Your Honor, I have a motion on this testimony. I don't mind making it now or, please the Court, whenever you tell me.

THE COURT: We will wait.

MR. PURCELL: All right, sir.

MR. HARRIS: Your Honor, can Mr. Ryan be excused?

THE COURT: Yes. Does anyone want to retain him?

MR. PURCELL: No, sir.

MR. ELLINGTON: No, sir.

THE COURT: You are excused. You want to stop the clock from running?

MR. HARRIS: Pardon?

MR. PURCELL: Shall I go now, Your Honor?

THE COURT: Yes.

MR. PURCELL: Your Honor, I have objection to the testimony and would move to strike –

MR. HARRIS: I would ask if we're going to have this motion that the jury be excused, Your Honor

THE COURT: Let's do that later. Now are you

* * *

[IV-212] duty to do precisely that.

Now under our rules of procedure, the Plaintiff in the case has the right to make an opening and a concluding argument.

All right. You may proceed, Mr. Ellington.

MR. PURCELL: Your Honor, I have a motion to make.

THE COURT: I will permit you to do that after we get through with these arguments just as if you had done it now. I do not want to take up jury time when we can take that up later.

MR. PURCELL: I understand that, Judge. But there is a motion that I have to make on the evidence, not about – it's not a Rule 50 motion. It's a motion concerning the economic testimony. And I think that the sides, the parties, are entitled to know the Court's intention with regard to that.

THE COURT: All right. Members of the jury, go to the jury room.

(Jury out at 3:47 p.m.)

THE COURT: All right. Be seated.

Mr. Purcell?

MR. PURCELL: Your Honor, as to the testimony by the accountant who testified, there is evidence only of gross profits and gross sales, There is no testimony of earnings or the effect on earnings.

[IV-213] THE COURT: What do you say to that? What is the value of his testimony when he does not take into consideration the costs?

MR. HARRIS: The way he basically calculated it was he looked [sic] the invoices, and he calculated –

THE COURT: I heard what he said.

MR. HARRIS: – the lost profits or lost part sales and the impact on the sale of new cars caused by refurbished one year olds.

The thing I want to point out –

THE COURT: Mr. Harris, he clearly said that he did not take into consideration the expenses in making his or giving his opinion as to what was lost.

MR. HARRIS: Your Honor, they had the opportunity to cross-examine him, and they had the opportunity to challenge his conclusions. I also want to point out –

THE COURT: They just did.

MR. HARRIS: – they didn't put up any counter-witness to dispute those numbers. And they tried initially to make a *Daubert* motion. And they never put up any evidence to dispute the fact that the way he calculated those numbers was improper. They make a *Daubert* motion on the day of trial. They've had –

THE COURT: That is something else. We are talking about his testimony here, where he said he did not [IV-214] take into consideration the costs and expenses in arriving at his opinion on what was lost

MR. HARRIS: Well, then he –

THE COURT: That is his only testimony.

MR. HARRIS: Then they can argue that he should have taken that into account. That does not mean that the testimony is not admissible.

THE COURT: That is sheer common sense.

MR. HARRIS: But, Your Honor –

THE COURT: They do not need testimony as to that.

MR. HARRIS: But, Your Honor, they can contend that's it's improper for him to have done that. It doesn't affect –

THE COURT: It is not improper. It just, really, denigrates the value of his opinion.

MR. HARRIS: But, Your Honor, they didn't bring a single expert witness in to sit in that chair and denigrate the value of his expert opinion. That's –

THE COURT: He did it himself.

MR. HARRIS: If it was so bad, they could have found someone to dispute it.

THE COURT: He did it himself.

MR. HARRIS: Well, Your Honor, they can challenge that conclusion. They can argue to the jury that it's improper. They can say –

[IV-215] THE COURT: That is what he is doing now.

MR. HARRIS: Well, he's welcome to argue it to the jury, and he's – he was welcome to put up contrary evidence, but he chose not to do it, and he chose to wait until the last second to dispute the testimony.

THE COURT: I am going to leave it in for whatever it is worth. But I am telling you the weakness of it.

MR. HARRIS: I understand that. I understand, Your Honor. He's more than welcome to argue. That's why we're here, to argue –

THE COURT: I thank you for that concession.

MR. PURCELL: Judge, I think under the federal rule, under the federal law, you are obligated to – you can't just let any evidence go to the jury.

MR. HARRIS: Now he's back to the *Daubert* motion.

MR. PURCELL: May I finish with my argument, Mr. Harris?

You can't let any evidence go to the jury without considering whether it's proper scientific evidence. And this is exactly –

THE COURT: That is his objection; you are giving a *Daubert* objection.

MR. PURCELL: I'm going to make that *Daubert* objection all day long. There is no time that a valid objection is time barred. There is no case that says a [IV-216] *Daubert* objection is time barred.

It is the Court's responsibility to exercise its gatekeeper function and not let testimony like that, of $10 million, without considering the amount of money that it takes to make $10 million, go to the jury. And –

THE COURT: Why not argue that point to the jury?

MR. PURCELL: Because, Your Honor, that's not my job. It's your job not to let him have it.

MR. ELLINGTON: Your Honor, I am joining in his objection.

THE COURT: I understand you are joining with everything. You do not have to say it.

MR. PURCELL: Your Honor, it's right there in the page that I gave the Court earlier on the consideration of testimony, on page 281 of the reference guide of damages in the reference manual on scientific evidence.

It's got a section on economic damages and what's in and what's out and how you compute those damages. And it's exactly how he didn't. And the jury doesn't need to be dealing with $10 million today.

MR. HARRIS: I'm not sure what –

MR. PURCELL: And it's sheer orchestrating and lawyer arguments about how it is or isn't the legitimate standard.

MR. HARRIS: I'm not sure what submission to the [IV-217] Court he's referring to.

MR. PURCELL: The one I put back there on your desk.

MR. HARRIS: This was submitted, apparently, before, and I never – I wasn't aware of that.

Your Honor, I would refer you to Rule 702. Now if the expert calculates damages based on a standard accounting way of calculating damages, then that amount is admissible. If they want to dispute –

THE COURT: He never testified to that.

MR. HARRIS: If they want to dispute that he should have deducted something, they can do that and they could have to put up a witness. Why they would wait until right now to ambush us when they could have filed a *Daubert* motion six months ago after they deposed this guy twice is beyond me. There is a way to do this.

THE COURT: Mr. Harris, you put the witness up, and he testified. Now they did not have to demonstrate that his opinion was worthless.

MR. HARRIS: Your Honor, these are good lawyers. They know how the process is done. This man was deposed twice. If they felt like his testimony was not – pursuant to 702, was not proper, they know how to file a *Daubert* motion. They know how to –

THE COURT: That may be, but I let him testify; [IV-218] did I not?

MR. HARRIS: Yes, Your Honor.

THE COURT: And he, by his own testimony, destroys the validity of it. So I am going to sustain the motion to strike his opinion as to damages.

MR. HARRIS: Well, Your Honor, then that's the equivalent of entering a directed verdict in this case.

THE COURT: Whatever it is equivalent to –

MR. HARRIS: Your Honor, if you are ruling – they have waited until the last second to bring up this issue. They don't have a witness who will contradict this man's testimony. He's an accountant. He has testified, and he knows how to calculate damages. If they think he could have deducted something from it, they can cross-examine him. They did.

If they thought it was improper, they could have put up a witness. Why they would wait until right now to do this, to ambush us, I just cannot fathom.

THE COURT: Well, he made his motion – I deferred it somewhat – at the conclusion of that witness' testimony.

MR. HARRIS: And exactly, Your Honor, if he didn't know what that witness was going to say.

THE COURT: Why else would he have done it?

MR. HARRIS: He has deposed the witness twice –

THE COURT: That does not make any difference.

[IV-219] MR. HARRIS: – and he's waited until now to do this.

MR. PURCELL: Judge, we weren't even in the case when he was deposed.

THE COURT: Nevertheless, that is my ruling.

MR. HARRIS: Well, I'm at a loss as to how we proceed, Your Honor. You have, essentially, directed a verdict on damages based on his oral *Daubert* motion and based on the fact that there hasn't been any contrary –

THE COURT: After all, you had Mr. Murphy up here testifying, did you not, about his damages?

MR. HARRIS: He didn't testify about the damages to his company.

THE COURT: I thought –

MR. HARRIS: Well, Your Honor, we put up a witness, and they had the opportunity to Daubert that witness pretrial. Is it Your Honor's –

THE COURT: Mr. Harris, you may except to the ruling, but that is my ruling.

MR. HARRIS: Is Your Honor's ruling that the verdict has been directed?

THE COURT: I did not say anything about that. You are the one that is talking about directed verdicts.

I ruled out the evidence or the testimony of the witness that demonstrates that his opinion is valueless.

[IV-220] MR. HARRIS: Well, Your Honor, there is no testimony in the record now, since you have done that, on damages. There isn't any. You have now stricken the only damages expert. And, therefore, we cannot prove – because you have stricken that damages expert, we cannot –

THE COURT: Mr. Murphy testified as to what he thought his damages were. That testimony is in the record.

MR. HARRIS: Respectfully, Your Honor, he didn't.

THE COURT: I have heard enough argument on that.

MR. HARRIS: I'm simply trying to find out how I should proceed, Your Honor. We have no evidence in the record on damages.

THE COURT: You are the lawyer. You are disregarding the testimony of your own client.

Bring in the jury.

MR. ELLINGTON: Your Honor, just for the record, before the jury comes in, we have a motion to bring before the Court under Rule 50. And I simply want it noted on the record.

THE COURT: We will take that up sometime later. I hate to keep the jury waiting.

MR. ELLINGTON: I understand. I hate to try Your Honor's patience, but could I simply ask for ten minutes at this point to gather my notes so I don't waste the jury's time in this closing argument?

[IV-221] THE COURT: All right. I think Mr. Harris would appreciate that, too. Go ahead. Ten minutes. Well, get to it.

MR. ELLINGTON: If you want to give me fifteen, I'll take it.

THE COURT: No, ten is enough.

(Recess at 3:55 p.m. until 4:08 p.m.; jury present)

MR. HARRIS: Your Honor, I have one short matter I need to get clarification on about the prior order, if we can approach and do that?

(At sidebar on the record)

MR. HARRIS: As I understand what the Court has ruled on, it has – ruled out the testimony, pursuant to Mr. Purcell's objections, on what would be item seven, lost sales.

MR. PURCELL: Judge, it's everything.

THE COURT: No, not everything. He gave some testimony regarding the value of the business.

MR. PURCELL: Did he do that?

THE COURT: They are entitled to that. And the fact that Mrs. Murphy said they lost business, there was some evidence as to that.

MR. HARRIS: One other thing, about the margins –

THE COURT: I am going to let it stand.

MR. PENN: If I may say something? This is the [IV-222] first time we have seen this document, and I want to let you know and put it on the record that this was misrepresented by Mr. Purcell. It does not say what he says it did. It's from a reference guide.

THE COURT: I cannot help that. I have not read it.

MR. ELLINGTON: Your Honor, I have a question. I simply need to ask, are you going to instruct the jury regarding Mr. Ryan's testimony before I begin?

THE COURT: Before you begin, yes, I guess so.

(End of discussion at sidebar)

THE COURT: Members of the jury, with respect to Mr. Ryan's testimony as to damages, when he says that he did not take into consideration the expenses involved and merely used the gross amount, his opinion as to the loss on the Defendant's counterclaim is stricken. You are not to consider that.

Go ahead.

MR. ELLINGTON: Thank you, Your Honor. Members of the jury, we appreciate on behalf of Club Car the attention that you have paid to this case this week. We understand that jury duty is an imposition of your time, and we appreciate your attentiveness and willingness to listen to all of us this week present our case.

On Monday, when I stood before you, I explained

* * *

[IV-239] MR. HARRIS: May it please the Court, ladies and gentlemen of the jury, I think one thing we can all agree on is this is a lot more than a simple collection case.

There are two claims that Club Car (Quebec) has brought in this case. There are two sets of claims. And the claims really have a dividing line in the year 2000.

There are a series of events that occur before the year 2000, and there are a series of events that occur after 2000. Now I want to begin with talking to you about what was occurring before the year 2000.

The evidence you have heard has made it abundantly clear to you that, beginning around 1996, Martin Murphy began to make a lot of noise about what was happening to him. He began to say over and over and over again to Club Car, "Where are all these parts coming from? Why are you setting someone up to compete with me? What is happening here?"

And over and over again, Club Car said to him, "We don't know what you're talking about."

Now ask yourself one simple question. If there was nothing wrong with what they were doing, as Mr. Ellington has alluded to, if there was nothing wrong with what they were up to, why was everybody so secretive about it?

Why, when Mr. Murphy said, "Where are the parts

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CLUB CAR (QUEBEC) IMPORT, INC.,
MARTIN MURPHY, PETITIONERS

v.

CLUB CAR, INC.,

AND

PIERRE CHAMPIGNY, EQUIPMENTS PIERRE CHAMPIGNY, LTD.,

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IN THE

Supreme Court of the United States

CLUB CAR (QUEBEC) IMPORT, INC.
and MARTIN MURPHY,

Petitioners,

v.

CLUB CAR, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PIERRE CHAMPIGNY AND ÉQUIPEMENTS PIERRE CHAMPIGNY, LTD.

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Équipements Pierre Champigny, Ltd. does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

The U.S. Court of Appeals for the Eleventh Circuit properly affirmed the trial court's discretionary determination to strike portions of the damage testimony presented at trial by petitioner Club Car (Quebec) Import, Inc. ("CCQ")'s accounting expert. The accountant's testimony about CCQ's alleged lost profits, sales, and margins was misleading and unhelpful to the jury under Federal Rule of Evidence 702 because it was methodologically flawed. *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004), Appendix to Petition for Writ of Certiorari ("Pet. App.") at 1a-16a, *reh. & reh. en banc denied*, __ F.3d __ (11th Cir. Jun. 29, 2004). Both the trial court's and the Eleventh Circuit's rulings are fully consistent with the trilogy of cases decided by this Court charging trial courts with a "gatekeeping" obligation, under Rule 702, to screen from the jury expert testimony that lacks reliability. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999) (sometimes referred to as the "*Daubert* trilogy.").

The hallmark of a *Daubert* inquiry is flexibility in both procedure and substance. "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one." *Daubert*, 509 U.S. at 594. "The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." *Kumho Tire*, 526 U.S. at 152. Petitioner, by contrast, would have this Court reign in a trial court's discretionary authority under Rule 702 by establishing inflexible substantive and procedural "bright lines" and "procedural lines." Petition for a Writ of Certiorari

("Pet.") at 17, 18, 20. Petitioner's justification for such a radical transformation of *Daubert* principles is "clarification." Pet. at 22. Yet, the message delivered by the *Daubert* trilogy could not be more clear: "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire*, 526 U.S. at 152.

COUNTER-STATEMENT OF THE CASE

Respondent Pierre Champigny is the owner and president of Respondent Équipements Pierre Champigny Ltd. ("ÉPC"). *Club Car*, 362 F.3d at 779, Pet. App. at 3a; Record ("R.") 12-161-2 to 3. ÉPC, a family business incorporated and headquartered in Quebec, Canada, is the distributor of new Club Car golf cars and parts in Quebec. ÉPC succeeded CCQ as the Quebec Club Car distributor in 2000 after Club Car decided not to offer CCQ another distributor agreement. *Club Car*, 362 F.3d 779, Pet. App. at 3a; R. 12-161-2.

Originally not parties to the lawsuit filed by Club Car against CCQ in August 2000, ÉPC and Pierre Champigny were joined to that action by CCQ in 2002 as counterclaim defendants. CCQ, as counterclaim plaintiff, sought to recover damages from ÉPC and Pierre Champigny for allegedly conspiring with Club Car to breach CCQ's distributorship contract, tortiously interfering with CCQ's business and contractual relations, defaming CCQ, and violating federal and state Racketeering Influenced and Corrupt Organizations ("RICO") statutes. R. 9-117. ÉPC and Pierre Champigny challenged the RICO claims in a summary judgment motion, which was granted by the trial court in January 2003, thus eliminating those claims from trial. R. 24-326.

The remaining claims were tried to a jury in February 2003. The trial court issued no pre-trial orders requiring *Daubert* motions to be made before trial or by a certain date. On the fourth day of trial, CCQ presented as its damages expert financial accountant Peter Ryan. Ryan testified, *inter alia*, that based upon his review of certain financial information provided by CCQ, Club Car, and ÉPC, CCQ suffered damages as a result of the actions of Club Car and ÉPC. R. 39-452-32. As pertinent to the pending petition, Ryan separated those damages into lost sales, lower margins,[1] and lost profits and placed a monetary value on each separate category of damages. *Id.* He testified about the amount of damages CCQ allegedly incurred from 1997 through the date of trial and also the amount he believed CCQ would continue to incur from the date of trial through calendar year 2005. *Id.*[2]

During his testimony, Ryan confirmed that all of the damage values he calculated for lost profits, sales, and

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1. "Margin" means gross profit. *See, e.g.*, Black's Law Dictionary 666 (abr. 6th ed. 1991) ("In commercial transactions the difference between the purchase price paid by a . . . retailer and his selling price. Also called gross profit margin.").

2. CCQ is simply incorrect, therefore, when it represents to this Court that its damages at trial "involved . . . no future damages." Pet. at 4. Ryan's testimony could not be more clear. On direct examination, he explained that the last two categories of damages he calculated were lost sales from 2002 to 2005 and lost profits from 2001 to 2005. R. 39-452-32. CCQ's distributor contract with Club Car ended in September 2000. The trial was held in February 2003. There is no question, therefore, that the damages CCQ was seeking at trial were future damages.

margins were gross numbers.[3] He admitted that he did not take into consideration any expenses whatsoever that CCQ would have incurred in generating the margins and profits. R. 39-452-94. He further admitted that he assumed that all margin or profit made by CCQ would go directly into its bank account without having to account for any expenses related to that profit or margin. *Id.* at 95-96. On the other hand, when asked how the income and loss figures on CCQ's financial statements were calculated, he readily conceded that those figures would be net numbers, "arrived at by applying generally accepted accounting principles, charging out depreciation, including expenses of the fur business and any losses arising therefrom." *Id.* at 61. CCQ's financial statements included such expenses as delivery costs, depreciation, interest, salaries, taxes, telephone services, and travel. Club Car Trial Exh. 108 at 4, R. 35-449-9 (offered), R. 41-453-63 (admitted). Thus, although "in the real world," there would many categories of expenses associated with generating profits and margins, Ryan admitted that he did not take into account any expenses in calculating CCQ's lost profits.

After Ryan completed his testimony, counsel for ÉPC and Pierre Champigny raised a *Daubert* challenge,[4] arguing

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3. "That would have been the gross margin on the sale of one year old cars for that period of time." R. 39-452-37. "I calculated the cost of these parts by reference to the pricing manual from Club Car, and then applied the gross profit on a per package basis to the number of packages that I previously calculated." *Id.* at 39. "I testified previously that I had calculated damages at a gross margin number." "I already said its at a gross level." *Id.* at 99.

4. This objection was actually the third of three times that the *Daubert* challenge was made during trial. Immediately after CCQ

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that Ryan's testimony was fundamentally and economically flawed and lacking in reliability and helpfulness to the jury because his damage calculations failed to take into consideration any costs or expenses involved in generating profits, sales, and margins.[5] The trial court agreed that Ryan's

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(Cont'd)
called Ryan to the witness stand, counsel for Club Car asked for a hearing outside the presence of the jury. At side bar, counsel requested the trial court to exercise its "gatekeeping function," but the trial court declined to do so at that time, stating "you should have called my attention to it long before." R. 39-452-13. After Ryan's voir dire as to qualifications, Ryan's testimony was again challenged, this time on the basis of his qualifications. The trial court ultimately rejected this challenge as untimely and ruled "I am going to let him testify over your objection." *Id.* at 25. At the conclusion of Ryan's direct examination, cross-examination, and re-direct examination, counsel for ÉPC and Pierre Champigny reasserted the *Daubert* objection because *Daubert* and Rule 702 of the Federal Rules of Evidence so clearly forbid a jury from considering the unreliable and unhelpful lost profits testimony given by Ryan. The trial court, however, deferred argument on that reasserted objection until after the jury had been excused for the day so as to make the most efficient use of the jury's time. *Id.* at 114-15. By the time the trial court heard argument on the *Daubert* objection, the parties had all rested. *Id.* at 211-22. Thus, it is simply not correct, as CCQ maintains, that the *Daubert* challenge was held back until "after the close of evidence." Pet. at 12.

5. Under Georgia law applicable to this diversity action, the formula for computing lost profits is clear: "the gross amount minus expenses equals the amount of recovery." *Shaw v. Ruiz*, 207 Ga. App. 299, 304, 428 S.E.2d 98, 99 (1993). The plaintiff seeking lost profits must "show the probable gain with great specificity as well as expenses incurred in realizing such profits." *Id.* It is not possible to reasonably compute lost profits without taking into consideration the expenses incurred in generating those profits. *Complete Concepts, Ltd. v. General Handbag Corp.*, 880 F.2d 382, 392 (11th Cir. 1989).

failure to factor in any expenses whatsoever to his lost profit calculations "denigrates the value of his opinion," even without another expert coming in and saying as much. In effect, Ryan undermined his own opinion by his candid admissions that he failed to account at all for costs and expenses. R. 39-452-211 to 22. Before the case was given to the jury for its deliberation, the trial court instructed the jury to disregard any of Ryan's testimony where he failed to factor in costs or expenses. *Id.* at 222. With the exception of that stricken testimony, however, the jury was at liberty to consider any other testimony given by Ryan in its determination of CCQ's damages.[6]

Prior to the *Daubert* hearing, counsel for ÉPC and Pierre Champigny had handed the court clerk a copy from a page out of the Reference Manual on Scientific Evidence, from the chapter entitled "Reference Guide on Estimation of Economic Losses in Damages Award." When counsel for ÉPC and Pierre Champigny attempted to discuss this excerpt with the court, however, CCQ's counsel complained that the excerpt was not properly served on him. *Id.* at 216-17. CCQ labels this submission an *ex parte* communication. In reality, there was nothing at all *ex parte* about this submission. Counsel for ÉPC and Pierre Champigny had placed it on the tables of CCQ and Club Car in the courtroom before the *Daubert* hearing, *id.* at 217, a point later confirmed at a post-trial motion hearing, at which time Club Car's counsel confirmed that he had witnessed this service and CCQ's counsel conceded as much: "If [counsel for ÉPC and Pierre Champigny] says he laid it on the table, I am not going to stand here and argue with that, that he laid it on the table, because I believe what he said." R. 42-461-18.

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6. Once again, therefore, CCQ's petition misrepresents the factual record when it states that "the trial court struck Ryan's expert opinion evidence on damages *in its entirety*." Pet. at 13.

More importantly, however, the submission was not a "communication" at all. "Communication" implies that there was a sharing of information with the court. There was no such sharing of information, however, because, as the trial court clearly stated on the record during trial, it had not even seen the excerpt before making its *Daubert* ruling. R. 39-452-222. CCQ's petition fails to mention this point, even though it was part of the Eleventh Circuit's ruling affirming the trial court's *Daubert* determination: "the trial court indicated he had not even seen the excerpt when it made its ruling." *Club Car*, 362 F.3d at 781, Pet. App. at 6a.

At the conclusion of the five-day trial, the jury found in favor of both ÉPC and Pierre Champigny as to liability and, accordingly, awarded CCQ no damages on its counterclaims against either ÉPC or Pierre Champigny. *Club Car*, 362 F.3d at 779-80, Pet. App. at 4a; R. 41-453-70.

After the trial court denied CCQ's post-trial motions for new trial and for judgment as a matter of law, CCQ appealed. The Eleventh Circuit, applying *Joiner*'s deferential eye, affirmed the *Daubert* ruling, both in substance and as a matter of procedure. Substantively, the Eleventh Circuit noted that Ryan's testimony failed to comport with Georgia law requiring that his lost profit calculations factor in expenses normally incurred in generating sales and income. Ryan himself testified that he had not factored in any expenses whatsoever into his lost profit calculations although in the real world he would have done so. Thus, Ryan's testimony ran obviously afoul of the "general acceptance" factor identified in *Daubert*. *See Daubert*, 509 U.S. at 593-94 (degree to which experts in the field accept technique relevant

to admissibility).[7] *Club Car*, 362 F.3d at 780, Pet. App. at 5a.

CCQ's procedural challenges fared no better. The Eleventh Circuit properly determined that the trial court's procedures conformed to the *Daubert* trilogy because the court had permitted extensive voir dire and cross-examination of Ryan and heard lengthy argument on Ryan's methodology before striking the testimony as misleading. *Club Car*, 362 F.3d at 780-81, Pet. App. at 6a. Heeding this Court's directive that a trial court must have "broad discretion in determining how to perform its gatekeeper function," the Eleventh Circuit refused to reverse based on the timing of the *Daubert* challenge, noting that "nothing prohibits [a trial court] from hearing a *Daubert* motion during trial." *Club Car*, 362 F.3d at 780, Pet. App. at 6a. Because there was an adequately developed record from which the trial court could make its Rule 702 determination, the Eleventh Circuit found that the trial court's exercise of its discretion was soundly within the flexible procedural boundaries established by the *Daubert* trilogy. *Club Car*, 362 F.3d at 780-81, Pet. App. at 6a.

REASONS FOR DENYING THE PETITION

The writ must be denied as to Respondents ÉPC and Pierre Champigny because the trial court's Rule 702 determination excluding Ryan's lost profits testimony cannot cross the harmless error threshold as to these Respondents.

7. Affirming on this basis, the Eleventh Circuit did not reach, nor did it need to reach, any other rationales articulated by the trial court in its Order denying CCQ's post-trial motions for new trial and for judgment as a matter of law. Ryan's failure to conform his testimony to generally accepted accounting principles, by itself, was more than sufficient rationale for the Eleventh Circuit to affirm the trial court ruling.

The jury found that neither ÉPC nor Pierre Champigny were liable to CCQ and awarded CCQ no damages against ÉPC and Pierre Champigny. Therefore, even assuming the trial court's ruling somehow contravened the *Daubert* trilogy – which it did not – that ruling had no effect on the jury's verdict in favor of ÉPC and Pierre Champigny.

The trial court's *Daubert* assessment fully comported with the directives of this Court in the *Daubert* trilogy. CCQ's arguments, distilled to their essence, boil down to nothing more than a disagreement with the way the Eleventh Circuit decided the appeal. Pet. at 15 ("The Eleventh Circuit must be reversed for the legal error in excluding the expert. . . ."). CCQ tries to paint this case as one of a trial court run amok, Pet. at 19 ("The predictable result . . . is the slipshod analysis and shoddy procedure demonstrated [by the trial court] in the instant case, ..."), and a court of appeals that totally abdicated its judicial responsibility, Pet. at 22 ("the Eleventh Circuit opinion in the instant case, above all, must not become the bellwether for 'anything goes' in *Daubert* admissibility determinations. . . ."). CCQ conjures up many dire policy justifications for granting the writ and concludes that this Court must exercise supervisory power over the Eleventh Circuit because that Court allegedly sanctioned egregious departures from the accepted and usual course of judicial proceedings. This Court should reject petitioner's invitation to second-guess a trial court and court of appeals that properly applied *Daubert* and its progeny.[8]

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8. Yet other reasons to deny the writ are CCQ's utter disregard of this Court's rules and flagrant misrepresentations contained in papers it filed with this Court. Under Supreme Court Rule 29.5, when CCQ filed its petition, it was also required to file a proof of service containing a statement that all parties required to be served "have

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I. Any Alleged Error in the Exclusion of Ryan's Damage Testimony Was Harmless as to Respondents Équipements Pierre Champigny, Ltd. and Pierre Champigny Because the Jury Found No Liability on The Part of These Respondents

As its conclusion, CCQ requests that "the petition for writ of certiorari . . . be granted and the judgment below reversed." Pet. at 23. Over sixty years ago, this Court held that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Palmer v. Hoffman*, 318 U.S. 109 (1943). CCQ cannot carry the burden of showing that reversal of the judgment is justified as to Respondents ÉPC and Pierre Champigny, however.

By its own admission, CCQ is seeking a new trial only as to damages. Despite the breadth of the concluding sentence of the petition, all of the questions raised by CCQ focus on the trial court's ruling striking Ryan's lost profits testimony. Quelling any doubt about what it hopes to accomplish here, CCQ admits that "unlike many *Daubert* cases, the exclusion of the expert did not affect the liability determination." Pet. at 7. Thus, in the section of the petition denominated "What is Sought," CCQ asserts that "[t]his case should be

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been served." According to this Court's docket entries, CCQ filed its petition on September 27, 2004. The proof of service filed with the petition contains the statement that "I hereby certify that I am this day serving . . . 3 copies . . . by first-class mail" and is dated September 27, 2004. Attached as an appendix to this brief in opposition is a copy of the envelope received by counsel for ÉPC and Pierre Champigny containing their services copies. The envelope is post-marked September 29, 2004, two days ***later*** than the date that CCQ certified to this Court as the date on which it served its petition under Rule 29.5.

remanded with instructions to assess damages according to the improperly excluded expert damages evidence." Pet. at 4.

The jury, however, did not award CCQ any damages as to Respondents ÉPC and Pierre Champigny because the jury found in their favor as to liability. Thus, as to ÉPC and Pierre Champigny, even assuming error in the trial court's *Daubert* ruling, such alleged error cannot cross the threshold of harmless error contained in Federal Rule of Evidence 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."), Federal Rule of Civil Procedure 61 (error in excluding evidence not ground for new trial or vacating judgment unless refusal to take such action appears to court inconsistent with substantial justice) and 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). *See also United States v. Borden Co.*, 347 U.S. 514, 516 (1954):

> [W]e are of the opinion that, even assuming error in each of the challenged rulings, it does not appear that admission of the evidence in question would have been sufficient to change the [outcome of the trial] . . . hence the rulings cannot be said to have affected substantial rights of the parties within the meaning of 28 U.S.C. § 2111.

In this case, even if the trial court had allowed the jury to consider all of Ryan's damage testimony, that determination would not have changed the jury's verdict of no liability as to ÉPC and Pierre Champigny. Accordingly,

CCQ cannot carry its burden of showing that prejudice resulted and is not entitled to reversal of the judgment in favor of ÉPC and Pierre Champigny.

II. The Eleventh Circuit's Ruling, Affirming the Trial Court's Discretionary Determination to Exclude Ryan's Damage Testimony Because Such Testimony Was Based on Flawed Methodology That Was Unaccepted in the Accounting Community, Fully Comported With the *Daubert* Trilogy

A. The Factors Considered by the Trial Court in its *Daubert* Assessment Were Relevant and Fit the Facts and Issues of the Case

CCQ maintains that the trial court's *Daubert* assessment was flawed because it was not based on "germane factors" and, therefore, failed to fit the facts of the case. In point of truth, however, as the record fully bears out, the factors relied on by the trial court, and sanctioned by the Eleventh Circuit, came straight out of *Daubert*.

As noted, CCQ was seeking damages in the form of lost profits. Under Georgia law, the formula for computing lost profits is "the gross amount minus expenses." *See supra* note 5. When Ryan calculated CCQ's damage figures, he failed to deduct any expenses whatsoever. He admitted, though, that when calculating profit and loss statements, he would use generally accepted accounting principles and charge out costs and expenses incurred in making any profits. The trial court ruled that Ryan, by his own testimony, therefore, destroyed the validity of his opinion. R. 39-452-218. The Eleventh Circuit's ruling mirrored that of the trial court: "Ryan['s estimate of CCQ's damages] was based on

gross sales and gross profit figures. Ryan admitted he had not factored in expenses CCQ would normally incur in generating income and sales." *Club Car*, 362 F.3d at 780, Pet. App. at 5a. Therefore, "[Ryan's] lost profit calculation was based on flawed methodology that was unaccepted in the accounting community. *See Daubert*, 509 U.S. at 593-94 (degree to which experts in the field accept technique relevant to admissibility)." *Club Car*, 362 F.3d at 779, Pet. App. at 5a.

CCQ also makes much in its petition of several additional factors cited by the trial court in its post-trial Order denying CCQ's motions for new trial and for judgment notwithstanding the verdict: failure to reduce to present value, failure to adjust for inflation, and revenues CCQ would have earned despite Club Car's alleged misconduct. Pet. at 11-12. CCQ asserts these factors all relate to future damages, which it was not seeking at trial, and therefore the trial court's use of these factors in its post-trial order was irrelevant and failed to fit the facts of the case. Putting aside CCQ's factual misstatement that it was not seeking future damages at trial, *see supra* note 2, the fundamental flaw in CCQ's argument on this point is that the Eleventh Circuit affirmed the trial court's *Daubert* ruling solely on the basis that Ryan's testimony failed to conform to generally accepted accounting principles, as noted above, *supra* note 7. The other factors cited by the trial court in its post-trial motion, which were fully supported by the trial record, did not enter into the Eleventh Circuit's analysis. Therefore, the Eleventh Circuit did not countenance the trial court's alleged "failure to consider relevant factors," as CCQ maintains.

CCQ also condemns both the trial court and the Eleventh Circuit for not considering Ryan's explanation about why he

did not deduct additional costs. Pet. at 14. When Ryan gave such an explanation, however, he was discussing an entirely different element of damages than lost profits: e.g., his evaluation of the value of CCQ should it be sold to another company. R. 39-452-55, 57, 108. Ryan testified that in a sale of the business, "the amount of incremental administrative expenses would be minimal." *Id.* at 108. His explanation about not deducting costs, therefore, is unrelated to his prior testimony about lost profits and was properly not part of the reasoning employed by the Eleventh Circuit in affirming the trial court.

CCQ also faults the trial court for failing to articulate exactly what costs Ryan should have deducted from his lost profits calculations. Pet. at 13-14. This argument is specious. As noted, the trial record contains evidence as to the costs and expenses that would normally be considered in calculating profits and losses, but Ryan admitted he ignored all of these expenses when he calculated CCQ's alleged lost profits. Because Ryan failed to factor any costs whatsoever into his lost profits calculations, it was not necessary for the trial court to "spell out" with any more specificity the methodological shortcomings of Ryan's damage testimony.

CCQ also maintains that the Eleventh Circuit's ruling must be reversed because it is "contrary to the precedent of this court in *Bazemore v. Friday*," 478 U.S. 385 (1986). Pet. at 15. *Bazemore* is a Title VII case decided by this Court seven years before *Daubert*. The plaintiffs in that case alleged that the North Carolina Agricultural Extension Service had engaged in a pattern and practice of racial discrimination. They presented expert statistical evidence as proof of discrimination. The trial court rejected this evidence because the expert had not included a number of variable factors the

court considered relevant, including pay increases that varied from county to county. The U.S. Court of Appeals for the Fourth Circuit reversed. This Court, however, found the regression analysis admissible, despite the omission of certain variables. *Id.* at 400 ("While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors, 'must be considered unacceptable as evidence of discrimination.'"). *Bazemore* is hardly precedential authority for reversal of the Eleventh Circuit's ruling in this case. *Bazemore* does not stand for the proposition that "failure to consider all ***cost*** variables goes to probativeness, not admissibility," as CCQ represents. Pet. at 14 n.19 (emphasis added). *Bazemore* does not refer to ***cost*** variables at all. *Bazemore* does not speak to the admissibility of expert testimony under Rule 702 of the Federal Rules of Evidence or *Daubert*. It does not even speak to damage evidence. It is both factually and legally inapplicable to this case. Therefore, *Bazemore* provides absolutely no basis for concluding that the Eleventh Circuit sanctioned any departure by the trial court of the usual and accepted course of judicial proceedings.

In short, far from staying outside the evidentiary boundaries set by the *Daubert* trilogy, as CCQ proposes, both the trial court and the Eleventh Circuit hewed diligently to *Daubert* by resolving the admissibility issue based on factors that come straight out of *Daubert*. The lower court rulings, therefore, could not have been more relevant nor more tied to the facts of this case.

B. The Trial Court's *Daubert* Ruling Was Fully Supported by the Evidence and Legal Authority

CCQ accuses the trial court of making an "off-the cuff" *Daubert* ruling, without any evidentiary or legal support, and proposes a number of "bright line" tests that are allegedly necessary to curb abusive trial practices. In reality, however, the trial court had ample evidence and legal authority from which to conclude that Ryan's lost profit testimony should be stricken. The "bright line" tests suggested by CCQ would serve only to destroy the flexibility that is the hallmark of the *Daubert* assessment.

One bright line test suggested by CCQ is that no trial court ever be permitted to strike an expert's testimony unless there is testimony from an opposing expert. No such opposing testimony was required in this case, however. As the trial court noted, Ryan himself provided evidence of the unreliability of his methodology when he testified he did not take into consideration costs or expenses but would have done so if calculating lost profits using generally accepted accounting principles. The trial court did not need to hear testimony from an opposing expert to conclude that Ryan's testimony was methodologically flawed. Ryan's lost profit calculations imploded on the weight of their own shortcomings. In *Kumho Tire*, this Court limited its inquiry to virtually the same evidence – testimony of plaintiff's expert – when it decided that the trial court properly excluded the testimony under *Daubert* and Rule 702. *Kumho Tire*, 526 U.S. at 154 ("the transcripts of Carlson's depositions support both the trial court's initial uncertainty and its final conclusion. Those transcripts cast considerable doubt upon the reliability of both the explicit theory . . . and the implicit proposition. . . ."). CCQ's invitation to this Court to impose

as a bright line test that no trial court ever exclude expert testimony unless an opposing expert offers contrary testimony is legally at odds with the *Daubert* trilogy and unnecessarily restrictive.

Similarly flawed is CCQ's argument for yet another bright line test: "that legal authority not properly before the court is inexcusable and cannot be, or even appear to be, a basis for exclusion." Pet. at 18 n.25. CCQ faults the trial court for allegedly basing its *Daubert* determination on the so-called *ex parte* communication noted above and faults the Eleventh Circuit for not realizing the importance of that event. Pet. at 16-17. Even if the page from the Reference Manual had not been properly served on CCQ's counsel (a point never established by CCQ and which Respondents deny, as noted previously), that legal authority had absolutely no impact on either the trial court's ruling or the Eleventh Circuit's affirmance because, as noted, the trial court never read it before it made its *Daubert* ruling. R. 39-452-222; *Club Car*, 362 F.3d at 781, Pet. App. at 6a.[9] It is hardly surprising, therefore, that the Eleventh Circuit may have "dismissed the importance" of the alleged *ex parte* communication, as CCQ suggests. For these reasons, there is no justification for applying any "bright line" test about the legal support that must be before a trial court for it to make its *Daubert* determination.

In the final analysis, therefore, CCQ has offered no cogent reasons for curtailing the "considerable leeway" accorded to trial courts in carrying out their "gatekeeping

9. Thus, there is absolutely no factual support for CCQ's statement that the trial court's "ruling turn[ed] on" the page from the Reference Manual. Pet. at 17 n.24. A ruling cannot possibly "turn on" a document never read by the court.

obligation" or for establishing "bright line" tests that would only create meaningless constraints on a trial court's Rule 702 authority.

C. The Trial Court's Rationale for its *Daubert* Ruling Was Enunciated Concurrently With Its *Daubert* Ruling

CCQ posits that the trial court ruling is infirm because it was supported by an after-the-fact justification in an order denying CCQ's post-trial motions for new trial and for judgment as a matter of law. Pet. at 18. As the record fully substantiates, however, the trial court's rationale – Ryan's failure to consider costs and expenses in his lost profit calculations – was announced at trial at the very time that the trial court rendered its *Daubert* ruling. Although the trial court may have elaborated on the evidentiary basis for the ruling in its post-trial order, based on evidence presented at trial, the Eleventh Circuit's affirmance was based only on the rationale given by the trial court at trial. Therefore, there were no "post facto justifications" of the trial court's *Daubert* assessment in this case, as CCQ states.

Because the trial court's ruling was made during the course of trial, CCQ had an opportunity to test the trial court's reasoning, present facts and argument supporting the grounds for admission of Ryan's testimony, and explain why, under *Daubert* and its progeny, the trial court was making an erroneous ruling. No "extreme dangers" are suggested by the manner in which the trial court voiced its *Daubert* assessment in this case. No "inherent dangers" lurk in the shadows for this Court to dispel. To the contrary, the manner in which the trial court announced its *Daubert* ruling gave CCQ the very opportunity it

says it deserved to test that ruling through the "adversarial process." Nothing more was or should be required under the *Daubert* trilogy.

D. The Trial Court Had Broad Discretion to Allow a *Daubert* Challenge at Trial

Yet another "bright line" test urged by CCQ is that *Daubert* challenges be raised before trial in a motion *in limine* and only rarely, if sufficient justification exists, entertained at trial. Pet. at 20-21. Imposing such a test, however, would be a big step backward from the *Daubert* trilogy.

In *Kumho Tire*, this Court refused to impose a bright line laundry list of the factors to be assessed by a trial court in its *Daubert* determination because "[t]oo much depends upon the particular circumstances of the particular case at issue." *Kumho Tire*, 526 U.S. at 150. Because a *Daubert* assessment requires a case-specific, individualized inquiry about the relevance and reliability of an expert's testimony, "[t]he trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, . . . as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." *Kumho Tire*, 526 U.S. at 152. The rationale for the Court's disinclination to set down any bright line procedural standards governing a trial court's *Daubert* assessment was that "the Rules seek to avoid 'unjustifiable expense and delay' as part of their search for 'truth' and the 'jus[t]determin[ation]' of proceedings." *Kumho Tire*, 526 U.S. at 152-53.

Thus, as reflected by the Advisory Committee's note to the 2000 amendments to Rule 702:

> The amendment makes no attempt to set forth procedural requirements for exercising the trial

> court's gatekeeping function over expert testimony. See Daniel J. Capra, *The Daubert Puzzle*, 38 Ga.L.Rev. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule (citations omitted).

This commentary reflects *Daubert*'s confidence that "federal judges possess the capacity to undertake this review," 509 U.S. at 593, without the necessity of imposing strict guidelines on how to undertake the review. Thus, *Daubert* objections can properly be raised following a deposition, in conjunction with a motion for summary judgment, in a pre-trial motion *in limine*, or at trial. The challenge can be oral or written. A trial court can resolve the objection by requiring separate briefing, by holding a hearing, or by listening to the testimony at trial and then making a ruling. The procedure employed will necessarily depend on the facts of each individual case. Federal courts throughout the country have utilized a number of different procedures to carry out their "gatekeeping obligation." *See, e.g.*, Manual for Complex Litigation-Fourth §§ 23.352, 23.353 (2004). None of these approaches are abusive under *Daubert* or call for strict guidelines, as argued by CCQ.[10]

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10. CCQ posits *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083 (10th Cir. 2000), as an allegedly factually similar case because "the defendant [in *Goebel*] missed the motion in limine (Cont'd)

This case is an example of why trial judges need considerable procedural flexibility in exercising their gatekeeping function. As noted, the trial court initially rejected the *Daubert* challenge as too late, which the court had broad discretion to do. What the court did not have discretion to do, however, was to refuse to exercise its *Daubert* responsibility at all. *See, e.g., Kumho Tire*, 526 U.S. at 158-59 (Scalia, J., concurring) (trial court discretion in choosing manner of testing expert reliability "is not discretion to abandon the gatekeeping function."). Thus, after Ryan testified and it became crystal clear that his lost profits testimony contravened *Daubert*'s general acceptance factor, the challenge was re-asserted, and the trial court, obviously concerned about the methodological deficiencies of Ryan's lost profits testimony, properly heard argument on that challenge and properly struck the lost profits testimony as unreliable and unhelpful.

The procedure employed by the trial court in striking Ryan's lost profits testimony is not unlike the process scientists undertake in their scientific endeavors, as noted by this Court in *Daubert*: "In the endless process of testing

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(Cont'd)
deadline and moved to strike the expert after the plaintiff rested." Pet. at 20. In reality, however, the defendant in *Goebel* challenged the opposing expert on three separate occasions: in a motion in limine, when the witness was called to testify during trial, and in a post-trial motion for judgment as a matter of law. The trial judge rejected the challenge and admitted the expert testimony. Unlike this case, the trial judge in *Goebel* had denied the challenge without making any findings whatsoever. Therefore, the Tenth Circuit found an abuse of discretion because of the lack of any findings in the record to support the admission of the evidence, not because of the timing of the challenge.

and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." *Daubert*, 509 U.S. at 597 n.13 (citing B. Cardozo, The Nature of the Judicial Process 178, 179 (1921)). In this case, the trial court's *Daubert* ruling properly removed the "dross" from the jury's consideration and left intact any part of his testimony that was "pure and sound and fine." There was nothing abusive or improper about how or when the trial court reached its *Daubert* determination. The bright line sought by CCQ as to the timing of a *Daubert* challenge would serve no purpose other than to eliminate, without any reason for doing so, the flexible procedural boundaries established by the *Daubert* trilogy.

E. Ryan's Lost Profits Testimony Was Not Excluded on the Basis of Ryan's Deficient Qualifications

CCQ's final challenge can be disposed of in short shrift. CCQ complains that the trial court wrongfully excluded Ryan's damage testimony based on his qualifications, or lack thereof, and that the Eleventh Circuit ignored this alleged reversible error. Pet. at 21. As the record fully bears out, however, the basis for the trial court's exclusion of Ryan's testimony was his flawed methodology, not his paltry qualifications.

Although the trial court was originally inclined to exclude Ryan's testimony because he had never testified as an expert on economic damages before and had no experience evaluating the type of damages about which his testimony concerned, R. 39-452-23, the Court reconsidered, after CCQ's strenuous entreaties, and allowed Ryan to give expert testimony despite his marginal qualifications, *id.* at 25. Despite the objections of Club Car, ÉPC, and Pierre Champigny that Ryan was unqualified, the Court held, "I am going to let him testify over your objection." *Id.*

As is evidenced by the record, Ryan's testimony was not excluded because of his qualifications. Therefore, despite CCQ's efforts to elevate the court's qualification ruling to an undeserved matter of prominence, it is hardly surprising that the Eleventh Circuit never addressed this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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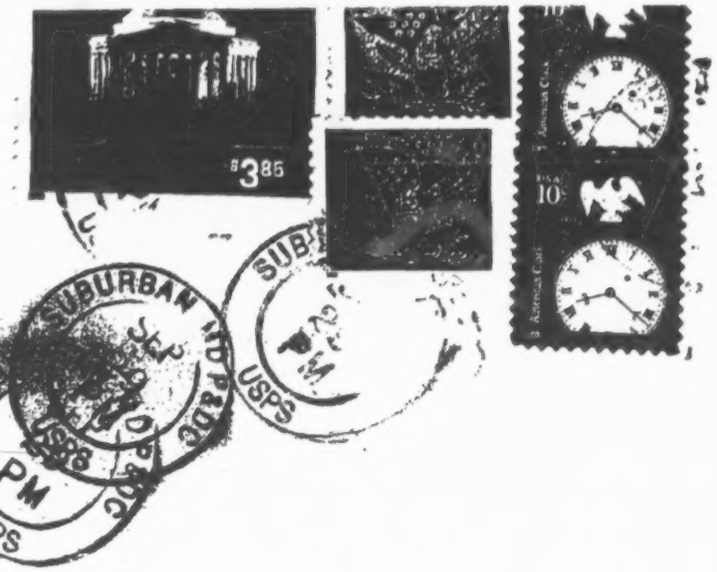
APPENDIX

PHOTOCOPY OF ENVELOPE FROM CCQ



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Supreme Court, U.S.
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No. 04-421

IN THE

Supreme Court of the United States

CLUB CAR (QUEBEC) IMPORT, INC.,
MARTIN MURPHY, PETITIONERS

v.

CLUB CAR, INC.,

AND

PIERRE CHAMPIGNY, EQUIPMENTS PIERRE CHAMPIGNY, LTD.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Respondents' Briefs in Opposition provide ample evidence why *Daubert* determinations must not be allowed to become an exercise in hide the ball by the attorneys or snap decisions by the trial court. Respondents try to draw the eye of this Court to every irrelevant consideration, up to and including the time the mailman postmarked their service copies. They distort the facts, characterizing this as a routine collections case, for example, conveniently overlooking the fact that the jury found against Club Car on CCQ's counterclaims for breach of contract, promissory estoppel, unpaid commissions, and breach of fiduciary duty. However, the jury was unable to award significant damages because virtually all the damages evidence was excluded after an abbreviated and chaotic hearing on a motion first raised after the close of evidence.

Respondents also argued in their briefs that there was no harm in the deficient proceedings because the trial court did not strike the entire testimony of CCQ's expert, Peter Ryan, though they argued forcefully for exactly that during all five minutes of the Daubert hearing, and the court obliged, pronouncing the witness completely excluded. See Petition, p. 7 & App. 137a. Respondents reverse course on appeal, realizing that there is no basis whatsoever in the record for excluding, for failure to discount to present value, CCQ's past damages, or for excluding, for failure to deduct expenses, damages based on reduced margins, promissory estoppel, unpaid commissions, or breach of fiduciary duty. They invoke instead another post-trial rationale, the supposed failure to follow generally accepted accounting principles, though no evidence was offered at trial on this subject.

The trial court and the Eleventh Circuit failed to uphold the trust placed in them by *Daubert*--by presiding over and allowing such a confused and illogical proceeding, and allowing such rationales to be advanced post-trial, after the witness had already been excluded.

While Respondents also seek to draw even this Court into irrelevant and distorted factual inquiries on appeal, Respondents never give a single reason for letting the motion in limine deadline pass without making their objections known. They do not allege they were not aware of the expert's methodology, after deposing him twice. In fact, their arguments that the deficiency of his method was so obvious merely beg the questions: Why did Respondents not file a timely motion in limine? Why could they not find an opposing expert to dispute the methodology of CCQ's expert? The only reason, which Respondents cannot deny, is to substitute ambush value for a full airing of the issues.

What has occurred instead of the careful review and creation of a record that should precede a Daubert decision is that the courts below have undertaken an after-the-fact revision, in which all the argument and authority, inapposite as it is, was supplied after the ruling was already reached. This reverse-order justice, in which the conclusions precede the analysis, turns this Court's decisions in *Daubert* and its progeny on their heads, as what is supposed to be a careful and reasoned analysis to determine the reliability of evidence is itself turned into a process without reliability or credibility.

Thus Respondents' attempts to argue that there is no important federal issue here, only a little collections case in Augusta, Georgia, are highly deceptive. *Daubert* has been gutted in this trial, and this evisceration has been blessed by the Eleventh

Circuit. The federal court system can ill afford to let Daubert proceedings jump the track into anarchy, as the Eleventh Circuit has done in this case, and this Court must draw admissibility determinations back within the ample and flexible bounds set by *Daubert*.

Irrrelevant Factors

Respondents argue that, despite the amendment of its claims, CCQ was asking for future damages at trial. See Petition, p. 4. Because CCQ originally had claims for future damages, which were dropped immediately prior to trial, CCQ expert Peter Ryan dealt with these claims in his preliminary expert reports—which were preliminary because Respondents had not produced the invoices from which damages were being determined. Since these future damages claims were dropped with the court's approval in the pre-trial conference, CCQ sought to subtract those numbers from Ryan's damages estimates at trial. Trial Transcript, Vol. IV, App. 151-156a. Respondents and the court insisted, however, that Ryan present his report as originally written, without revising his presentation to eliminate claims no longer in the case. Id. Yet those are the very future damages claims which, according to the court, were not discounted for present value, from which expenses were supposedly not deducted, and on which Respondents very Daubert objection hinges. Thus it is yet another example of the ways in which Respondents and the court below drew the inquiry away from the relevant issues. Respondents still seek to confuse those issues today, and confusion should not be the hallmark of a Daubert proceeding.

The fact that there is still an argument about what claims are in the case demonstrates quite effectively how little analysis preceded the court's

ruling. Trial courts should at least be required to match the grounds for excluding evidence with the corresponding issues and claims. That did not occur prior to the exclusion, in his entirety, of CCQ's expert.

At trial, the court based its ruling solely on a failure to deduct expenses. It paid no attention to Ryan's **unrebutted** testimony that the sales lost through Club Car's breach of contract would not have added significantly to CCQ's expenses. See Petition, p. 14 & n.18.[1] It paid no attention to the fact that expense deductions have no bearing on several categories of damages excluded on that basis, such as reduced margin damages. The courts below and Respondents completely ignore this context with all their out-of-context citations to Ryan's gross margin testimony.

As part of its after-the-fact clean-up, the trial court mentioned for the first time Ryan's failure to follow generally accepted accounting procedures. Respondents now rely on the Eleventh Circuit seizing on this rationale to uphold the exclusion. However, there was no evidence whatsoever at trial as to what those accepted procedures were or how Ryan supposedly violated them—by failing to deduct expenses that he testified, without opposition, did not apply. Club Car's own expert did not challenge Ryan's accounting methodology, and was not called to testify at trial.

Daubert, on the other hand, must be about placing the evidence in context, not about taking it out

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[1] Respondents argue that this testimony was not directed precisely at the substance of their motion. That is because they did not make their motion based on the accounting methodology until after the witness was excused. This only reinforces the necessity of giving appropriate prior notice and bringing on a timely basis Daubert objections that are known and planned in advance.

of context, considering evidence that was never presented—or even substituting the "common sense" of the court for evidence and testimony. App. 160-161a. Such sheer fabrication of a rationale without a record must be called an abuse of discretion and a breach of *Daubert's* requirements.

After the Fact Authority

Respondents now argue *Shaw v. Ruiz*, 207 Ga. App. 299, 428 S.E.2d 98 (1993) as proper grounds for the "common sense" exclusion of CCQ's expert. This is the only legal authority ever offered to justify the exclusion, though it was never cited, briefed, or argued prior to the exclusion of CCQ's expert. Respondents and the courts below, however, all cite as conclusive the proposition from *Shaw* that damages equal lost profits minus expenses. Nowhere is there any mention of the fact that this language in *Shaw* relates to claims for lost future "anticipated damages," which were not in issue in the instant case. 428 S.E.2d at 102. In *Shaw*, these future damages were excluded because there were no past sales from which to extrapolate future damages. *Id.* The expenses referred to in the dicta of *Shaw* were not even at issue because—unlike the instant case, in which CCQ's expert gave unrebutted testimony that increased sales in the ongoing enterprise would not have created additional overhead expense—it was admitted in *Shaw* that all but $10,000 of the $79,000 claimed in lost future profits would have been eaten up by expenses. *Id.*

Does *Shaw* even apply to the facts and issues in the instant case? That is arguable. CCQ would have argued that it did not. Clearly, however, the time to argue this authority would have been at the time of the Daubert hearing, not on appeal, and not to the U.S. Supreme Court. The seminal point is, rather, that this

authority was never raised, briefed or argued prior to the exclusion of CCQ's expert. *Shaw* was first cited by the court on post trial motions to justify what had already been decided. It was not proper for the Eleventh Circuit to uphold this unexamined, post facto authority as conclusive.

If allowed, this practice of supplying the legal authority after the fact, without allowing the parties to argue whether it applies to the facts and issues in the instant case, effectively destroys *Daubert*. Daubert procedures were so deficient here that no legal authority whatsoever was offered for exclusion of the witness in advance of the ruling.

Respondents also engage in lengthy argument that this Court's ruling in *Bazemore v. Friday*,[2] that failure include a single cost variable goes to credibility, not admissibility, does not apply to the facts of this case.[3] Again, the fact that this argument is occurring now, in briefs to the Supreme Court, almost two years later, and never occurred prior to the exclusion of the witness, is a clear indication that the trial court never fulfilled its responsibility to air these issues before making a ruling under *Daubert*.

That is a sure sign that the requirements of *Daubert* have not been followed, when all authority and factors are raised in retrospect to justify a snap judgment already made, based on a motion withheld until the last day of trial for the very purpose of confusing the issues and prejudicing CCQ. The Eleventh Circuit must be reversed for stating that a proper Daubert analysis does not require more care and

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[2] 478 U.S. 285 (1986).

[3] *Id.* at 400.

exactitude by the court or professionalism by the attorneys.

Ex parte Argument

Respondents' counsel explains the attempt, without CCQ's knowledge, to impart legal argument to the court, by saying that copies of the document supporting the argument were left on CCQ's counsel table and given to the clerk of the court. As no one remembers seeing either of those copies and they have never been located, CCQ cannot say how that document and the argument it purported to support were transmitted to the court. App. 158a (document not in court record and clerk has no recollection of it).

This Court is not the place to engage in such a factual inquiry. What is clear, however, is that until the time Respondents' counsel made the oral argument for exclusion, CCQ had no prior notice either of the document or the argument previously transmitted to the court for excluding CCQ's expert for failure to deduct unspecified costs from his damages calculations. The court then ruled to exclude CCQ's expert before there was any opportunity to challenge that argument, consider the document, offer competing authority, or explore any of the ramifications of the very general proposition on which Respondents and the court relied. That is how past damages came to be excluded for failure to "discount them to present value."

Again, this cannot be the way a Daubert hearing is conducted, based on tardy motions and phantom submissions, with no actual prior notice to the other party. Basic standards of notice and fairness must apply. This case shows how the analysis suffers when they do not, as relevant factors are not considered, and irrelevant factors are substituted.

The Eleventh Circuit dismissed these concerns, overlooking the problem of "legal argument" being offered to the court before the other side even has notice of a challenge to the expert's methodology--so long as "evidence" is not being offered to the court on an ex parte basis. See Petition, pp. 16-17 & App. 6a. This Court should reverse the Eleventh Circuit on this point to make it clear that a higher standard of professionalism is required in a Daubert hearing, or any other phase of litigation.

Perhaps a more important consideration, for purposes of upholding the integrity of *Daubert*, is that the court excluded CCQ's expert evidence in its entirety within minutes of the disclosure of the document transmitted to the court and the objection it was offered to support. This was the first mention ever of any objection to the accounting methodology used by CCQ's expert. Respondents and the courts below maintain that some lengthy deliberative process followed this surprise development. The record speaks for itself that it did not, however, and this Court must re-draw the line to emphasize that the brief and chaotic developments in the trial of this case, sprung without any legitimate prior notice, do not satisfy *Daubert*. See Petition, p. 10 & App. 6a, 125-137a.

Conclusion

Under Respondents' theory, the discretion of the trial court is unlimited and cannot be abused. A five-minute discussion after the judge has already made up his mind and allows no further argument can be termed a "lengthy discussion" and thereby satisfy *Daubert*. Daubert objections may be planned in advance and sprung in ambush at the last minute.

This case provides a perfect example of the chaos this approach will cause. Almost two years after the

trial, exactly what was excluded, and upon what basis, is still debated. Accounting rationales and legal authority, which were never raised or argued before the decision to exclude, have been supplied after the fact.

Failure to discount to present value is one rationale offered, though it does not apply to past damages evidence that was excluded, and no future damages were argued to the jury. Failure to follow generally accepted accounting procedures is another post facto rationale, though this term was never used prior to exclusion, and no evidence was offered on this subject, including from Respondents' own expert accounting witness.

This failure to follow accepted accounting procedures purportedly rests on the failure to deduct expenses, though the undeducted expenses have never been identified. Expense deductions, furthermore, clearly do not apply to some categories of damages excluded. The unrebutted evidence is that there were no expenses to deduct. The only case law authority offered on this point was a future damages case, and was never cited, briefed, or argued prior to the exclusion of CCQ's expert.

This confusion is, in part, predictable given the tardiness of Respondents' motion to exclude based on faulty methodology. Yet Club Car cannot say why it waited till the last day of trial to make this motion. Nor can it say why, if the issue was so clear, it could not just follow proper, professional procedure and file a timely motion in limine.

The Eleventh Circuit has allowed Respondents and the trial court to make up after-the-fact explanations and justifications and confuse the issues after trial instead of clarifying the issues prior to a

ruling on admissibility. If that is not an abuse of discretion, then there can be no abuse of discretion under *Daubert*, and the purported procedure for ensuring the reliability of expert testimony is itself rendered completely unreliable. Instead, the order of the day will be surprise last-minute motions, adverse rulings without an airing of the issues, and after-the-fact application of factors which do not even relate to the issues in the case and authorities which were never raised or argued prior to exclusion of the expert.

To avoid that result, now is the time for this Court to follow the Tenth Circuit's suggestion and set a level of professionalism, competence, and reliability that will restore and maintain confidence in determinations of expert admissibility in the federal court system. See Petition, pp. 20-21. It can do that without altering the flexibility inherent in *Daubert* by simply requiring that the factors on which admission or exclusion is based meticulously match the facts and issues in the case, that a good faith attempt be made to examine the issues, that adequate notice and an opportunity to respond be given to all sides, and that a record be created with specific findings. None of that occurred in this case. In addition, this Court can require a justification for making a Daubert objection after missing a motion in limine deadline. No less is required to uphold the rulings of this Court under *Daubert* and to ensure the accuracy and reliability of expert witness admissibility determinations in federal court.

Respectfully submitted,

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No.CV100-195

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CLUB CAR, INC.,
Plaintiff,

vs.

CLUB CAR (QUEBEC) IMPORT INC.
and MARTIN MURPHY,
Defendants.

***

CLUB CAR (QUEBEC) IMPORT, INC.
Counterclaim Plaintiff,

vs.

CLUB CAR, INC.; PIERRE CHAMPIGNY;
EQUIPEMENTS PIERRE CHAMFIGNY, LTD. and
INGERSOLL-RAND CO., LTD., :
Counterclaim Defendants.

Augusta, Georgia

February 13, 2003

VOLUME 4
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE
ANTHONY A. ALAIMO

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The total damages identified in my report at that date are $10,464,176.

Q Okay. Now since that time, have you revised those numbers based on the claims that exist today?

A Some of the damages that I have identified I believe have not been presented as claims in this court. But by and large, those claims which have been presented reflect the numbers in this court.

Q And have -- since some of the claims have not been, are there revised numbers within that framework of the numbers that you provided earlier?

A There may be minor changes in terms of the number of units or variations of percentage or average selling price, something like that.

Q Let's talk about some of the specific numbers.

MR. PENN: Bob, if you will put up the damages.

BY MR. PENN:

Q Let's talk about how you arrived at these numbers. One portion is the calculation of damages for the sale of free new parts. And can you see that, by the way?

A Yes, I can.

Q If you want a copy --

MR. PENN: Your Honor, may I approach?

THE COURT: Yes.

MR. PENN: Thank you.

BY MR. PENN:

Q Under (A), what is this calculation right here?

A During the course of reviewing the documents which were produced, it was discovered that Club Car had been -- Club Car, Inc. -- had been shipping parts packages to Mr. Champigny with his cars. That information came -- what I did was -- Mr. Champigny produced his Customs documents. After a considerable period of time and considerable reduction in the number of documents due to duplication, I prepared a summary.

MR. ELLINGTON: Your Honor, I hate to object, but I'm going to object here because the testimony we're seeing now is brand-new testimony outside of the scope of his expert report. These type of calculations have not been presented here before.

MR. PENN: Actually, it comes right out of his report.

MR. PURCELL: I'm going to object, too, because I have a document that's got a different number on it.

THE COURT: You can cross-examine him on that.

MR. PURCELL: I understood the Court to limit the witness to his report.

THE COURT: Yes, yes.

Point out in the report what you're questioning him about, where in the exhibit it is.

BY MR. PENN:

Q Where does this --

THE COURT: No, no. My question is: Where in the report he filed, where is it?

MR. PENN: Right. That is my question to Mr. Ryan.

THE COURT: All right.

BY MR. PENN:

Q Mr. Ryan, where does this section (A) come from in your report?

A Section (A) refers to, under my summary and conclusions, item two, Damages on Parts Packages.

Q What is the number on your report?

A The number on my report is $921,435.

Q All right. And the number here is a little higher. Can you give an explanation as to why, what is the difference?

MR. PURCELL: Judge, he --

THE COURT: He cannot testify to that. He is limited to this.

MR. PENN: Okay. Thank you, Your Honor.

MR. PURCELL: And we would object to the screen showing the jurors numbers other than what is on the report, Judge.

MR. ELLINGTON: I have the same objection.

THE COURT: I will sustain the objection.

MR. PENN: May I consult with co-counsel for a second?

THE COURT: Certainly.

(Pause)

BY MR. PENN:

Q Mr. Ryan, the numbers that were on the screen, the total numbers for everything that is in that demonstrative exhibit, are they higher or are they lower than the numbers in your report?

A I would say for all intents and purposes, they are virtually identical. There are minor differences, certainly.

Q You just gave us a total --

THE COURT: Go on to your next question.

MR. PENN: I don't think he understood my question, Your Honor.

THE COURT: Did you understand his question?

THE WITNESS: I'm not sure I did, Your Honor.

THE COURT: All right. Go ahead. Restate the question.

BY MR. PENN:

Q Give us again, what is the total number that was on your report?

A The total number on my report was $10,464,176.

Q And what was the total number for the revised number that came out of your report?

A The total number, based on an extrapolation of my report ranged from $5,395,994 to $5,870,936.

Q So the revised numbers that are based on your report are lower than the numbers that were in your report?

A Yes, they are.

MR. PENN: Your Honor --

THE COURT: Generally speaking, his testimony is to what he filed in this Court, or rather the opinion that you filed in this Court.

BY MR. PENN:

Q Okay. Let's go back to your report, Mr. Ryan, and let's talk about the first conclusion. What was the number again? What was the conclusion and what was the number?

A The conclusion was that the damages on lost sales of one year old cars for the period 1997 to 2000 was $821,813.

Q All right. And that was for the loss of new sales?

A That would have been the gross margin on the sale of one year old cars for that period of time.

Q Okay. And how did you arrive at that calculation?

No.CV100-195

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CLUB CAR, INC.,
Plaintiff,

vs.

CLUB CAR (QUEBEC) IMPORT INC.
and MARTIN MURPHY,
Defendants.

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CLUB CAR (QUEBEC) IMPORT, INC.
Counterclaim Plaintiff,

vs.

CLUB CAR, INC.; PIERRE CHAMPIGNY;
EQUIPEMENTS PIERRE CHAMFIGNY, LTD. and
INGERSOLL-RAND CO., LTD.,:
Counterclaim Defendants.

Brunswick, Georgia

March 12, 2003

HEARING ON ATTORNEYS' FEES
BEFORE THE HONORABLE
ANTHONY A. ALAIMO
United States District Judge

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any other counsel or party, other than perhaps "good morning" or some other pleasantry.

Further, Mr. Harris incorrectly assumes that this document is the only basis upon which the Court could have ruled as it did. That's absurd. This Court has been on the bench since 1971 and has heard damage cases of all sorts since that time and can use its common sense and doesn't even have to rely on a document such as the one I put on Mr. Rowe's table.

THE COURT: Mr. Rowe, was that ever submitted to the Court?

THE CLERK: Judge, I just don't remember. There were so many documents, I don't recall it.

THE COURT: All right. In any event, is there any dispute that it was laid on your table?

MR. HARRIS: I never saw it. I just want to briefly respond.

THE COURT: Do you dispute it?

MR. HARRIS: I never saw the document.

THE COURT: Maybe not. Nevertheless, if he put it on the table --

MR. HARRIS: It Mr. Purcell says he laid it on the table, I'm not going to stand here and argue with that, that he laid it on the table, because I believe what he said. THE COURT: When you claim in a brief that there has been an ex parte communication with the Court, it ought to be pretty clear; should it not?

MR. HARRIS: Well, Your Honor, I think it was clear because Mr. Purcell submitted to the Clerk of Court a document. And then he took it -- and let's think about what the document was. It was a mimeographed page from a book on damages. Assuming, for the sake of argument -- and I believe him that he put it on our table -- it's meaningless. It's not any kind of pleading during the middle of trial that --

THE COURT: It bears on the question of whether it was ex parte.

MR. HARRIS: I think it -- Your Honor, ex parte simply -- he submits something that we don't have the opportunity to respond to because we don't know about it. And that's exactly what happened.

THE COURT: Nevertheless, if it is submitted to you and you did not see it or did not look at it --

MR. HARRIS: I would dispute the fact that if you put a mimeographed piece of paper on someone's desk at trial and don't tell him about it, that that's

submitting it to him. Clearly, Your Honor, I would never submit a document to Mr. Purcell and expect him to read it by sticking it on the table in the middle of trial without any indication that it was a pleading or something that had been served on the Court. I just think that's improper.

THE COURT: I think it is improper to make that contention unless you are pretty clear on it.

MR. HARRIS: Well, Your Honor, all we know is from the record that Mr. Purcell says he submitted a document for the Court's consideration that we weren't aware of. I think we can stand by that position.

As to whether or not the Court read it or not, I can't --

THE COURT: Or even saw it.

MR. HARRIS: Or even saw it. I'm not contending that the Court did. But I do know --

THE COURT: Now let me ask you this: Was that put up on the screen?

MR. HARRIS: No, Your Honor. It was a page -- it was a damages -- apparently, it was page from a damages textbook.

But there is one other point I want to respond to. And his point was that the Court could rule based on its common sense about this testimony. And I respectfully disagree with that. What they were making was a Daubert motion. They were saying that this man's

testimony did not have -- actually more correctly, Kumo Tire did not have a scientific basis for its admissibility. That's precisely what they were doing.

I respectfully don't think that courts can rule based on their common sense about technical evidence. The way it's supposed to work is you have some other expert come in and say, "That man's testimony doesn't comport with what accountants in the field do." Or you submit documents --

THE COURT: Are you saying that I could not come to a conclusion when the witness said he did not take into consideration expenses when he says what damages are, that I cannot, just as a matter of common sense, without being an expert or anything else, conclude that his opinion is valueless?

MR. HARRIS: Well, Your Honor, we're getting into the notion for new trial, which I'll be glad to talk about. But the problem with it was this: There were two elements of damages. There was a $5 million claim for lost future profits that wasn't even in the case. And the reason it wasn't in the case is because the Court had made a series of rulings up until the week before trial along the lines of, "You cannot maintain those claims."

So we were doing precisely what we had to do, and that was withdrawing certain claims from the jury's consideration. The $5 million that the cost or expenses was not purported deducted from wasn't even in the case. The $5 million that was in the case was simply Mr. Ryan taking invoices and calculating goods that had already been sold